THE DOCTRINE OF TAINTED DEBTS IN HINDU LAW

by

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ABSTRACT OF THE THESIS

The object of the thesis is to enquire into various aspects of the doctrine of 'tainted' debts in Hindu law, as found in the dharmaśāstras, and in the light of their interpretations by the commentators, digest-writers (nibandhakāras) and modern scholars; and to explain its present position as obtained at the hands of the modern courts of law, with an eye on remedies, if any, to rectify the ambiguity which presently surrounds the doctrine.

The first chapter begins with a brief survey of the sources of our information. Then, it explains the institution of the Mitākṣarā joint family, the father-son relationship, the function of the Pious Obligation, and ends with the introduction of the doctrine of 'tainted' debts.

The first part of the thesis - chapters two to four - enquires into the nature, scope and possible reasons for the exclusion of these debts, except the surety debts, from the son's liability mainly from the point of view of the śāstras as expounded by the commentators, digest-writers and modern scholars. In view of their peculiar nature as compared to rest of the enumerated debts, as well as their exceptional treatment in the śāstras, the surety debts are discussed separately in Appendix I.

In the second part, the fifth chapter is devoted to explaining certain similar but foreign legal concepts already known to the British judges, which seem to have influenced the judical opinion significantly while administering justice in respect of the doctrine of 'tainted' debts. Having this information as a background, the sixth chapter proceeds with the enquiry concerning the case-law on the subject, as developed by the modern courts of law. This, in turn, leads us to the question of 'notice of taint'. The significance of the doctrine of 'notice of taint', and its place in the modern Hindu law of debts is, therefore, discussed in the seventh chapter.

The final chapter contains the concluding remarks in respect of the future of the 'Pious Obligation' and the doctrine of 'tainted' debts in modern Hindu law.

Throughout the thesis an attempt is made to throw further light on the controversial points of law on the subject.

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I hope, those whose names, though they deserve mention, do not appear here due to the shortage of space, would understand my feelings and accept my thanks for whatever they have done during the period leading to and the preparation of this thesis.

A B B R E V I A T I O N S

A.C.	Appeal Cases
A.I.R.	All India Reporter
Ait.Br.	Aitareyabrāhmaṇa
A.L.J.	Allahabad Law Journal
A.L.J.R.	Allahabad Law Journal Reports
All.	Allahabad
All E.R.	All England Law Reports
Amb.	Ambler
And.W.R.	Andhra Weekly Reporter
Anst.	Anstruther
A.P.	Andhra Pradesh
Ap. or Apas.	Āpastamba
A.S.S.	Anandāśrama Saṁskṛta Series
Ath.veda	Atharva Veda
Atk.	Atkyns
Baudh.	Baudhāyana
Bg.G.	Bhagawat Gītā
B.O.R.I.	Bhandarkar Oriental Research Institute
Bom.	Bombay
Bom.H.C.	Bombay High Court
Bom.L.R.	Bombay Law Reporter
Bor.	Borradaile's Sudder Adawlut Reports
Br.	Bṛhaspati
Cal.	Calcutta
Ch.	Chancery Appeals
Ch.D.	Chancery Division
C.L.J.	Calcutta Law Journal
C.M.H.L.	A Critique of Modern Hindu Law
Cowp.	Cowper
C.P.L.R.	Central Province Law Reports
C.W.N.	Calcutta Weekly Notes
De G.& Sm.	De Gex and Smale
De G.M.& G.	De Gex, Macnaghten and Gordon
Digest	A Digest of Hindu law on Contracts and Successions
E.P.	Indian Law Reports, East Punjab
Eng.Rep.	English Reports
F.B.	Full Bench
f.n. or n.	Foot-note
G.O.S.	Gaekwad Oriental Series
Gaut.	Gautama
H.Dh.	History of Dharmaśāstra
H.L.	House of Lords
H.L.C.	House of Lords Cases
H.L.S.	Hindu Law in its Sources

I.A.	Law Reports, Indian Appeals
I.C.	Indian Cases
I.L.R.	India Law Reports(in this thesis references like (1925) I.L.R. 49 Mad.211, (1925) 49 Mad.211 or I.L.R. 1925 Mad.211 indicate, for example, Indian Law Reports Madras Series.)
I.M.H.L.	Introduction to Modern Hindu Law
I.T.R.	Income Tax Reports
J.	Journal Section
Jai.	Jaimini
J.A.O.S.	Journal of the American Oriental Society
J.& H.	Johnson & Hemming
J.& K.	Jammu & Kashmir
Kātyā	Kātyāyana
Kauṭ.	Kauṭilya
K.L.T.	Kerala Law Times
Lah.	Lahore
L.B.	Lower Bengal
Lon.	London
Luck.	Lucknow
Luck.L.J.	Lucknow Law Journal
M.	Manu
Mac.& G.	Macnaghten & Gordon
M.B.	Madhya Bharat
M.Bh.	The Mahābhārata
Medhā.	Medhātīthi
M.H.C.R.	Madras High Court Reports
M.I.A.	Moore's Indian Appeals
Mit. or Mitā.	The Mitākṣarā
M.L.J.	Madras Law Journal
Mort.Montr.	Morton, Montriou
M.P.	Madhya Pradesh
M.W.N.	Madras Weekly Notes
Myl.& Kee	Mylne and Keen
Mys.	Mysore
Nag.	Nagpur
Nār.	Nārada
N.U.C.	Notes of Unreported Cases
N.W.P.	North Western Provinces
Or.	Orissa
Oxf.	Oxford
Parā.	Parāśara
Parā.Mādha.	Parāśara Mādhava
Pat.	Patna
P.C.	Privy Council
P.& H.	Punjab & Haryana
Phill.	Phillimore's Reports
Phil.ch.	Phillip's Chancery Reports
P.L.J. or Pat.L.J.	Patna Law Journal
P.O.	The Pious Obligation

P.R.	Punjab Records
Punj.	Punjab
P.Wms.	Peere Williams
Q.B.D.	Queen's Bench Division
Ṛg.	Ṛgveda
R.L.S.I.	Religion, Law and the State in India
Sau.	Saurashtra
S.B.E.	The Sacred Books of the East
S.C.	Supreme Court
S.C.J.	Supreme Court Journal
S.D.A.R.	Sadar Diwani Adalat Reports
Sm.& Giff.	Smale and Giffard
Suth.W.R.	Sutherland's Weekly Reporter
Tai.Br.	Taittirīyabrāhmaṇa
Tai.Sam.	Taittirīyasaṁhitā
T.C.	Travancore-Cochin
Vas.	Vasiṣṭha
Ves.Jun.	Vesey Junior
Ves.Sen.	Vesey Senior (ed. by Belt)
Vīr.	The Vīramitrodaya
Viṣ.	Viṣṇu
Yājñ.	Yājñavalkya
Z.V.R.	Zeitschrift für vergleichende Rechtswissenschaft

C O N T E N T S

CHAPTER I

INTRODUCTION

I.1 The sources of our information

I.2 The nature of the Mitākṣarā joint family

I.3. The Father-Son relationship

I.4. The function of the Pious Obligation

The doctrine of 'tainted' debts is an exception to the general rule under which a Hindu son is held liable to pay his father's 'just debts' (for further details see below p.41). Although a small part of the whole body of Hindu law, it has been instrumental in improportionately greater volume of litigation amongst the whole of the case-law accumulated so far under modern Hindu law. And yet, doubts persist with regard to its exact purport and applicability. It cannot be claimed however that no one has so far written about this doctrine; but, at the same time, it is true that no one has exhaustively dealt with all the aspects of law on the subject; hence this attempt.

1.1. THE SOURCES OF OUR INFORMATION

This doctrine is found in both the dharmaśāstra and arthaśāstra. The term "dharmaśāstra means 'the teaching (or science) of righteousness';"[1] and is generally considered as synonymous with the smṛti-texts - 'revelations remembered'.[2] The arthaśāstra is mainly a body of secular knowledge, and is generally regarded as a secondary authority only to that of the dharmaśāstra.[3]

The smṛti-texts are numerous:[4] Manusmṛti, Yājñavalikya-smṛti etc..

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1. J.D.M. Derrett, Dharmaśāstra and Judicial Literature, (Wiesbaden, 1973), p.2. On the meaning of the term dharma, see P.V. Kane, History of Dharmaśāstra, vol.I, (Poona, 1930), pp.1-4; K.V.R. Aiyangar, Rājadharma, (Adyar, 1941), p.26; R. Lingat, The Classical Law of India, (Berkeley, Los Angeles, London, 1973), pp.3-4, (vide here the trans. by J.D.M. Derrett).

2. H. Chatterjee, The Law of Debt in Ancient India, (Calcutta, 1971), Prefatory note, p.XV; also see P.V. Kane, op. cit., pp. 131-132; N.C. Sen-Gupta, Evolution of Ancient Indian Law, (London/ Calcutta, 1953), p.6.

3. K.V.R. Aiyangar, op. cit., prefatory note, p.VIII. However in view of its scope and the knowledge contained in the artha-śāstra, he says that "Vijñāneśvara brings Arthaśāstra on this among other grounds, under Dharmaśāstra"; Ibid., p.26.

4. P.V. Kane, op.cit., pp.131-135.

> "These texts represent a mixture of morality, religion, and law. They do not confine themselves to the enunciation of juristic rules for guidance of human conduct. The ceremonial rules, moral and religious injunctions and legal precepts are noticed in juxtaposition and no demarcation between them is uniformly maintained. The ethico-religious obligations are tressed here more in comparison with the legal obligations. The authors see even secular questions with an eye to the moral as well as social consequences of the rules. The composers of the dharmaśāstras however did not arrogate to themselves the position of law-makers, but they claimed to be exponents of the divine precepts of law[1] and compilers of tradition handed down to them."

Apparently, the dharmaśāstras dealt with life as a whole,[2] and therefore even the legal precepts contained in them have to be viewed in a wider context in order to evaluate their significance.

The commentaries, such as, for example, Medhātīthi's Manu-bhāṣya, Vijñāneśvara's Mitākṣarā on Yājñavalkya-smṛti, and the digests (Nibandhas) such as the Vyavahāra-Mayūkha, the Smṛticandrikā, the Vivāda-Ratnākara etc. have done the job mainly of interpretation and reconciliation of the smṛtis wherever they found apparent conflicts and contradictions.[3] However, like the commentaries, the digests did not confine themselves to a particular smṛti. On the other hand, both of them have made use of various smṛtis and other literature in order to expound the rules with which they were concerned. The digests have discussed the views not only of different commentators, but also of earlier nibandhakāras, e.g., Jagannātha's Vivādabhaṅgārṇava.

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1. H. Chatterjee, op.cit., pp.XV-XVI. Also see J.D.M. Derrett, op.cit., p.3; R.Lingat, op.cit., p.9ff, N.C.Sen-Gupta, op. cit. p.336.
2. K.V.R. Aiyangar, op.cit., p.34.
3. H. Chatterjee, op.cit., p.XVII; also see N.C. Sen-Gupta, op.cit., p.18 where he says, "The task of commentators was like that of the Roman Jurisconsults to reconcile the numerous texts and to adapt them to the existing conditions of society."

> "They developed the law not only with reference to the sacred traditions but also with equal regard to the practical needs of the society of the time. This becomes very prominent in the commentaries from Viśvarūpa and Vijñāneśvara down to authors like Caṇḍeśvara of Mithilā and Nīlakaṇṭha, who were practical lawyers and who tried to expound the law as much with reference to śāstras as to the practical needs of the society. It will appear from a study of these commentaries that it is by reference to the social usages and the needs of the society that each of the commentaries has been developed."[1]

In view of their superior scholarship and sound judgement, some of the commentaries are considered as authorities. The Mitākṣarā of Vijñāneśvara is a remarkable example of this, for, though a commentary on the Yājñavalkya-smṛti, it has been treated as a final authority throughout most of India. On the other hand, certain digests too have been followed by the modern courts as an authority in a particular part of the country, e.g. the Vyavahāra-Mayūkha in western India[2], i.e. Mahārāshtra and Gujarāt. The composition and compilation of nibandha-texts continued upto the end of the 18th century, and a few of them were written even under British patronage in India[3], e.g. the Vivādabhaṅgārṇava by Jagannātha Tarkapañcānana in c. 1792 A.D., which was translated by H.T. Colebrooke in three volumes between 1796-97 under the title of 'A digest of Hindu law on contracts and succession'. It may not be out of place to mention that Colebrooke's rendering of the śāstric precepts concerned, particularly that of the term avyāvahārika used by Vyāsa and Uśanas, has considerably influenced the doctrine of 'tainted' debts as developed by the modern courts of law.

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1. N.C. Sen-Gupta, op.cit., p.18.
2. For further information, see H. Chatterjee, op.cit., p.XVIII, f.n.2.
3. For further details, see J.D.M. Derrett, R.L.S.I., (London, 1968), pp.225-273; also see H.Chatterjee, op.cit., p.XIX. The literate public's interest in the śāstric literature still continues, see J.D.M. Derrett, Dharmaśāstra and Judicial Literature, op.cit., pp.6-7; K.V.R. Aiyangar, op.cit., p.2o

Amongst other sources of our information, mention must be made of the efforts of all the editors and translators of the śāstric works, the text-book writers, and the authors of independent dissertations, critiques and articles, both native and foreign, many of whom have thrown further light on various aspects of the śāstras as well as modern Hindu law by way of their learned interpretations, critical comments and rationalization of legal principles in view not only of the śāstras but also of comparative international jurisprudence.

All the works referred to or cited throughout this study have been indicated and properly acknowledged at the appropriate places as well as in the bibliography which accompanies the thesis.

In addition, a major source of information is the Law-Reports: English as well as Indian. These include the decisions made by various higher courts of law such as the Sadar Diwāni Adālats, High Courts, the Federal Court, the Privy Council and the Supreme Court of India.

However, as J.D.M. Derrett[1] says,

> "The courts frequently had difficulty in ascertaining and applying the śāstric rule, a misfortune springing from a literature which has largely been misunderstood. But the method adopted by the British since 1772 ..... produced a uniformity and certainty which would have been impossible if that misunderstanding had not occurred."

Admittedly the case-law has achieved a degree of uniformity and certainty; but on the other hand it will be found, particularly in respect of the doctrine of 'tainted' debts, that in spite of the judiciary's claim that it silll applies the śāstric law, its decisions have produced a result[2] according to which

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1. Dharmaśāstra and Judicial Literature, op.cit., p.9.
2. The decision in the case of Luhar v. Doshi, A.I.R. 1960 S.C. 964, in effect amounts to this. For the facts and detailed discussion see below pp. 248-249, 448 ff.

the son would have to pay, in certain circumstances, even proved tainted debts of his father. Besides, certain liabilities of the father, such as for example compensation arising out of his criminal acts, which the śāstras did not include in the category of 'tainted' debts, and for which the Orthodox Hindu Court did in fact hold[1] the son liable, have been brought under the doctrine by the modern courts of justice. Thus, the case-law has not fully succeeded in determining either the correct import or scope of the doctrine under consideration. An effort is therefore made to clarify the existing situation which is apparently far from certain so far as this doctrine is concerned.

Modern Hindu law, which in fact amounts to Anglo-Hindu law, is partly based on the śāstras, partly judge-made and partly enacted by the Legislature.[2] Apart from these sources, the subject matter of this thesis has reference to international jurisprudence too. For, as mentioned above, the British scholars and judges made the mistake of taking śāstric precepts for legal principles:

> "Now to mistake precepts for principles is to risk misjudging the system. It is clear that the British (mistaking the śāstra for a system akin to Canon Law as they knew it) made this mistake; and their contributions to Indian legal literature must be viewed against this background. They had no inward knowledge of the civilization they undertook to protect, and thus could not have applied the precepts even if they had recognised them as such. The vast discretion of the Hindu judge of the pre-British times could not figure in Anglo-Indian jurisprudence after about 1800, when the loose system of referring cases to arbitrators

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1. See Mahajar by B.V.B. at (1913) 15 Bom. L.R., Journal, p.97 at pp. 100-101; for further details see below p.47 ; also see G. Smith and J.D.M. Derrett, 'Hindu Judicial Administration in Pre-British Times and Its Lesson for Today', at 95 (3) Journal of the American Oriental Society, (July/Sept. 1975), 417, at p.422.

2. See J.D.M. Derrett, C.M.H.L., (Bombay, 1970) p.15, sec.22.

ceased to prevail.[1]"

As a result of this certain concepts of English law, such as, for example, the doctrine of 'illegal' or 'immoral' debts, which, as will be shown (see below chapter 5), were taken originally from Roman law, entered modern Hindu law and have significantly influenced the doctrine of 'tainted' debts. In order to explain such concepts of foreign origin, therefore, recourse had to bemade to a number of books dealing with Canon law, Roman law and the Law-Reports involving relevant cases on the subject.

Apart from the above-mentioned sources, I have made use of a few inscriptions, and have utilized, perhaps for the first time, the information derived from a couple of Maharjars (a written statement of a suit or case, and of the award upon it)[2] which throw further light on how far the śāstric precepts on the subject were applied in actual litigation by the Orthodox Hindu Court.

The method of research followed in the present thesis is broadly historical. Its first part deals mainly with the śāstric position in respect of the 'tainted' debts. Its second part is concerned with the doctrine as developed through the case-law. Generally the śāstrakāras' views are followed by the views of the commentators or digest-writers. But the method could not be strictly adhered to because in certain cases it was necessary to utilise the commentaries before other śāstric-texts in order to clarify the meaning of a particular

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1. J.D.M. Derrett, Dharmaśāstra and Judicial Literature, op.cit. p.4, "It was an error on the part of eighteenth-century foreign students of the few śāstric-texts then available to them to expect to find a complete code of law, ready-made, on European lines." Ibid., also see, N.C. Sen-Gupta, op.cit., p. 336.

2. J.T. Molesworth, A Dictionary of Marāṭhi and English, 2nd edn., (Bombay, 1857), p.636.

text concerned.[1] As far as the case-law is concerned the method is strictly pursued with the hope that it may help us to understand the evolution of ideas or legal principles involved. The discussion of the dharmaśāstra is generally followed by that of the arthaśāstra on each of the topics discussed; and in each case a conclusion has been drawn in the light of the discussion made, and also attempts have been made often to suggest possible explanation for the provisions of the śāstras. The same principle is followed in the rest of the thesis while explaining the related doctrines, and throughout our critical examination of the case-law concerning the doctrine of 'tainted' debts.

Any investigation or discussion of the doctrine of tainted debts could hardly be possible unless we have a certain prior knowledge of the nature of the Mitākṣarā[2] joint family, for it is a basic concern of our study. We need to go into the basis and the development of the father[3]-son[4] relationship as it has been envisaged by the śāstrakāras, the commentators and other jurists. We, then, have to ask ourselves: What were the legal consequences of this relationship, particularly in

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1. In order to understand not only the difficulty but also futility in discussing the smṛti-texts in their strict chronological order reference may be made to N.C. Sen-Gupta, op.cit., p. 20ff. At p.20, he observes, "The chronology of the texts relied upon for constructing the history is as yet little more than a mass of guesses."
   Also see H. Chatterjee, op.cit., p.XX, where he says, "To construct historically the original meaning of the smṛtis is often a speculative task."
2. In what we say in this chapter, it should be understood that we have in mind the Mitākṣarā joint family, and not the Dāyabhāga family. For the explanation of the difference between these two families, see K.K. Bhattacharya, The Law relating to joint Hindu Family, (Cal., 1885), pp.54, 158-59; P.Sen, The General principles of Hindu Jurisprudence, (Cal. 1918), p.161; J.D.M. Derrett, I.M.H.L., (Bom., 1963), pp.345-349; R.L.S.I., op.cit., p.413ff, 431 n.3; C.M.H.L., op.cit. p.55.
3. The term 'father' includes the father's father, and the father's father's father.
4. The term 'son' includes the son's son and the son's son's son.

respect of the repayment of the father's debt? How, if any, and to what extent does the pious obligation of the son come into play in connection with the debts of the father? It is only after answering these questions that we may be in a position to investigate and discuss the doctrine of the tainted debts. Let us start with a very brief account of the nature of the Mitākṣarā joint family.

1.2 THE NATURE OF THE MITĀKṢARĀ JOINT FAMILY

The Mitākṣarā joint family - named after the Mitākṣarā, a commentary on the Yājñavalkya-smṛti (1oo A.D. - 3oo A.D.), written by Vijñāneśvara (1125 A.D.) is, perhaps, of recent origin, in a sense, relatively to the joint or undivided Hindu family[1], the origin of which may go back into remote antiquity. Though useful, it is beyond the scope of this study to go into the details of its evolution[2] from the pre-historic period. We are fortunate, however, in the sense that we may be able to benefit from the research that has already taken place in this sphere.

As far as it concerns this study, the consensus of opinion of these scholars[3] appears to endorse overwhelmingly the view that the family of this age was, generally, of patriarchal form. Thus, it is said that

> "the Indo-European family is best conceived as resembling the Roman familia, i.e. as consisting of the women, children and slaves under the potestas of a single housemaster.[4]"

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1. For more detailed exposition of the subject reference may be had to K.K. Bhattacharya, op.cit., pp.1-61; J. Jolly, History of the Hindu Law, (Cal., 1885), pp.81-85; J.D.M. Derrett, R.L.S.I., op.cit., pp.4oo-436; The author here traces the history of the juridical framework of the joint Hindu family with a particular reference to Aryan and non-Aryan families in India.
2. For a brief survey, see J.C.Ghose, The Principles of Hindu Law, I, (Cal., 19o6), pp.363-366; N.C.Sen-Gupta, op.cit., pp.159-6o.
3. Such as Dr. Schrader and Rudolph von Ihering etc. ref. to by J.C.Ghose, op.cit., p.365,n.
4. ibid. p.363.

There is clear reference to the despotic power of the head of the family or house-holder (i.e. the living eldest ascendant) over his wives and children.[1] Apparently, the blood-relationship (mainly on the male side) was highly regarded, and the family property, it seems, belonged to them in common. For, "the notion of private property in land and soil was quite unknown to the Aryan: he recognized only common property."[2] The statement is admittedly conjecture, but, as the researches of Walter Ruben confirm,[3] private property in land made little sense in an age of migrations. This might help us as regards the remoter background before we begin to discuss the joint Hindu family.

Jointness was the normal condition of the Hindu family in ancient times,[4] which grew on patrilineal lines, and consisted of persons descended from a common male ancestor exclusively through males[5] but this does not mean that a male adopted or the famales married into the family were excluded. Besides, the original idea regarding property, especially, immovable property, namely, that it belonged to the family, and was intended for its support, and hence no member of the family had any right to dispose of it as he or she liked, except for family and religious purposes, seems to have been the law of the ancient Indians.[6]

It may be worth noting here, however, as observed by K.K.Bhattacharya,[7] that it is not the family which is ordinarily spoken of as joint or undivided, in the original texts, but

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1. ibid. p.364; There appear similar ref. in the Dharmaśāstra, see "A wife, a son, a slave --- may be beaten with a rope or a split bamboo." Manu VIII. 299, vide G.Bühler, trans., The Laws of Manu, S.B.E.25, (Oxf., 1886), p.3o6; also see, N.R. Raghavachariar, Hindu Law, 6th edn., (Mad., 197o), p.262.
2. J.C.Ghose, op.cit., p.366.
3. W.Ruben, Gesellschaftliche Entwicklung Indiens.
4. J.C. Ghose, op.cit., p.366.
5. N.C.Sen-Gupta, op.cit., p.16o; for similar views reference may be made to West & Bühler, Hindu Law, 4th edn., (Lon., 1919), p.6o4.
6. J.C.Ghose, op.cit., pp.366-67; also see J.D.M.Derrett, R.L.S.I., op.cit., pp.411-12.
7. op.cit., pp.53-54, 61.

it is the members composing the family who are said to be separated or unseparated. Thus, the jointness of the Hindu family could only be deduced from what the śāstrakāras have said in various context. For example, Manu refers to 'divided'[1] kinsmen, in the context of repayment of a debt, contracted for the purpose of the family[2], and states that the members of the family, though they may have separated afterwards, must pay the debt. It is well known, too, that undivided agnates could not act as sureties for each other. Likewise, it is through such legal maxims that the rights, the liabilities, the statuses, the obligations and the duties of the members[3] of a joint family have been gathered together. In this connection, the Mitākṣarā of Vijñāneśvara has been generally accepted as the leading authority[4] in India, and the joint family which is governed by this law is called the Mitākṣarā joint family.

The most distinctive feature of the Mitākṣarā law is its doctrine of the son's birthright. Thus, Vijñāneśvara says "that property in the paternal or ancestral estate is by birth."[5] In support of this proposition, he not only cites

1. Manu VIII.166, G.Bühler, trans, op.cit., p.283; also see Yājñ.II.45, vide J.R.Gharpure, trans., Vol.II, pt.3, (Bom., 1938), p.783; "Separated kinsmen as those who are unseparated, are equal in respect of immovables." Mit.I.1.3o, vide H.T. Colebrooke, Two Treatises on the Hindu Law of Inheritance, (Cal., 181o), p.257.

2. Nandana means by the term 'the family' 'a united family'. vide G.Bühler, op.cit., p.283, n.166.

3. For more detailed information regarding membership of the Mit. Joint family reference may be had to T.Strange, Hindu Law, I, (Lond., 183o), pp.198-199; Mayne's Treatise on Hindu Law and Usage, 11th edn., (Mad., 195o), pp.324-325; West & Bühler, Hindu Law, op.cit., pp.6o4-6o5; N.R.Raghavachariar, op.cit., pp.262-263; J.D.M.Derrett, I.M.H.L., op.cit., pp.244-45, sec. 398.

4. For similar views see K.K.Bhattacharya, op.cit., p.54; J.D.M.Derrett, C.M.H.L., op.cit., p.54; I.M.H.L., op.cit., p.345.

5. H.T.Colebrooke, op.cit., p.256, (Mit. I.1.27).

Gautama but also popular recognition.[1] This may be interpreted as indicating that the rule existed already and was not a new invention. Mitra Miśra (17th cent. A.D.) seems to support this interpretation.[2] Besides, the ownership of the father and son is said to be alike. Thus, according to Yājñavalkya[3], "The ownership of the father and son is the same in land which was acquired by the grandfather, or in a corrody, or in chattels;"[4] and as such, it would appear that neither is generally in a position to alienate it without the consent of others, except in the case of movables, wherein the father has an independent power of disposal for the purposes prescribed by dharma,[5] i.e. religious benefit, in which, ex hypothesi, all members of the family, past, present and future, would participate. On the other hand, "during a season of distress, for the sake of the family, and especially for pious purposes"[6] any member of the family may conclude a valid alienation even of immovable property. This is so particularly when the sons and grandsons are minors and incapable of giving their consent.[7]

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1. "It has been shown that the property is a matter of popular recognition; and the right of sons and the rest, by birth is most familiar to the world, as cannot be denied. --- for the text of Gautama expresses, 'Let ownership of wealth be taken by birth; as the venerable teachers direct." Mit.I.1.23 ibid., p.255.

2. Prāyeṇa vyavahāra-smṛtīnām loka siddhārthānuvādakatvam iti sakala-nibandhṛbhir abhidhānāt /
Vīr. I.37, vide G.Sarkar Sastri, ed.& trans., The Vīramitrodaya of Mitra Miśra, (Cal., 1879), p.10, for trans. see pp.19-20; also K.K.Bhattacharya, op.cit., pp.161-162.

3. Bhūr yā pitāmahopāttā nibandho dravyam eva vā/
tatra syāt sadṛśaṁ svāmyaṁ pituḥ putrasya cobhayoḥ//
Yājñ. 121, L.S. Joshi, Dharmakośa, vol.I, pt.2, (Wai, 1938), p. 1175.

4. H.T.Colebrooke, op.cit. (Mit.I.V.3), pp.277-278.

5. ibid., pp.256-257.

6. Mit.I.1.28, ibid., p.257; for a better translation see J.D.M.Derrett, I.M.H.L., op.cit., p.266.

7. Mit. I.1.29, vide H.T.Colebrooke, op.cit., p.257.

Thus, in the eyes of the śāstras, as interpreted by the Mitākṣarā, both the father and the son have equal right in the ancestral and the joint family property; and its alienation, except for śāstrically approved causes, might be objected to by the son.

There is, however, an exception to this general rule. According to the śāstras,[1] the son is said to be liable for his father's personal[2] and untainted[3] debts, incurred while he is joint with him, and the reason for this liability seems to be no other than his being the son of his father.[4] Thus,

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1. 'When the father has --- his debt should be paid by the sons and grandsons ---.' Yājñ.II.5o, vide J.R.Gharpure, trans., Yājñavalkya Smṛti, vol.II, pt.3, (Bom., 1938), p.792; "If he who contracted debts should die --- that debt shall be discharged by his sons grandsons." Viṣ.VI.27, vide J.Jolly, trans., Institute of Viṣnu, S.B.E.7, (Oxf., 188o), p.44; Nārada I.4, vide, J.Jolly, trans., Nārada, S.B.E.33, (Oxf., 1889), p.42; Kātyā. 55o, 554-55, vide P.V.Kane, ed.& tr., Kātyānasmṛti, (Poona, 1939), pp.227-28; also have similar provisions, and it may be correct to say that all these śāstrakāras, who have laid down the rule (see below f.n.3) to the effect that the son need not pay 'tainted debts' of the father, by implication, accepted this position.

2. 'Personal' because the debts for the purpose of the family etc. were to be paid by all the coparceners besides the sons; see Yājñ. II.45, vide J.R.Gharpure, op.cit., p.783; Manu VIII.166, vide G.Bühler, op.cit., p.283; Kātyā 542-43, vide P.V.Kane, op.cit., pp.225-26.

3. 'Untainted', for 'tainted debts' are excepted by the śāstrakāras; see, Gautama XII.41, vide G.Bühler, trans., S.B.E.2, (Oxf., 1879), p.241; Vasiṣṭha XVI.31, vide G.Bühler, trans., S.B.E.14, (Oxf., 1882), p.92; Manu VIII.159, vide G.Bühler, op.cit., p.282; Kauṭilya 3.16.9, vide R.P.Kangle, trans., Kauṭiliya Arthaśāstra, pt.II, (Bom., 1963), p.281; Nārada I.1o, vide J.Jolly, trans., op.cit., p.45; Kātyā, 554-55, vide P.V.Kane, op.cit., p.228; Yājñ.II.47, vide J.R.Gharpure, op.cit., p.786; Bṛhaspati XI.51, vide J.Jolly, trans., S.B.E.33, op.cit., p.329. Also, see P.V.Kane, H.Dh., vol.III, (Poona, 1946), pp.446-47, notes 752-754.

4. "If the father --- be dead or ---, then the debt incurred by him --- (should be paid) by the son or the grandson; and even when there exists no property of the father, in their capacity as son and grandson." Mit. on Yājñ. II.5o, vide J.R.Gharpure, op.cit., p.792. (My emphasis).

it would appear that though the son acquires an interes equal to his father's in all ancestral and joint family property, by birth alone he is liable to lose this to pay his father's debts, as mentioned above. Is this a good enough reason? Let us examine the father-son relationship.

1.3 THE FATHER-SON RELATIONSHIP

To facilitate better understanding of the father-son relationship, it is proposed to begin with a brief account of the background of Hindu life, as it is visualised in the śāstras. It is a characteristic śāstric theory that a man is born with three (or according to other authorities, four) debts, a concept of great antiquity as it is elaborated in the Śatapatha-brāhmaṇa amongst other texts much older than any of our smṛtis. These debts are envisaged as existing towards gods, human beings, and ancestors. Naturally, there is no conveivable limit to the debt to ancestors to whom ones' being is due.

K.V.Rangaswami Aiyangar, in his introduction to the Gṛhastha-kāṇḍa of the Kṛtyakalpataru of Lakṣmidhara Bhaṭṭa sums up,

> "The background of Hindu Life presents two features. Firstly, existence is conceived as continuous, stretching from the immemorial past into the future, life after life, through the force of Karma. Secondly, it is held that a debt which is contracted can be liquidated only by full discharge. So lang as one is in debt he is unfree. The obligation stretches beyond life, into as many lives as witness the unredemption of the debt. Release (mokṣa) is possible only for the debtless (anṛṇī). Short of full repayment, there is no way out."[1]

These two features, in view of this statement, may be explained as follows: Karma means action. Every action is subject to the law of consequences which is universal,[2] and it

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1. K.V.Rangaswami Aiyangar, ed., The Kṛtyakalpataru, vol.II, (Baroda, 1944) p.123.
2. K.V. Rangaswami Aiyangar, Aspects of the Social and Political System of Manusmṛti, (Lucknow, 1949), p.69.

is through the force of the interactions of karma and its consequences that life continues. The word debt is, in Sanskrit, termed 'ṛṇam', which means, besides debt, duty or obligation.[1] Unless it is fully paid, there is no release from the obligation, i.e. no mokṣa.

Both these features, action and debt, are further explained in the sense that they are two expressions or aspects of dharma. Accordingly, "In external terms, dharma is the action which, provided it is conformable to the order of things, permits man to realise his destiny to the full, sustains him in this life, and assures his well-being after death. By its own virtue that act produces a spiritual benefit for him who has performed it, which will necessarily bear fruit in the other world."[2] Thus, one who behaves according to dharma, is said to be the receiver of spiritual happiness or bliss, and even a little righteousness will save one from the great fear.[3] Conversely, an act contrary to dharma, it would appear, presents one[4] with adverse effects, either in this life or in the next.[5]

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1. H.T.Colebrooke, (see below f.n. 3 , p.56); also, see W.J.Bryne, A Dictionary of English Law, (London, 1923), p.624.

2. R.Lingat, op.cit., pp.3-4.

3. Nehābhikrama-nāśosti pratyavāyo na vidyate /
svalpam apy asya dharmasya trāyate mahato bhayāt //
Bg. Gītā, II.4o, vide A.Roy, ed., The Message of the Gītā, (London, 1938), p.35.

4. " --- an unrighteousness, once committed, never fails to bring its consequences to the perpetrator", Manu IV.173, vide here G.Jha, trans., Manusmṛti, vol.II, pt. 2, (Calcutta, 1921), p.436; for the text 'na tveva --- niṣphalaḥ'/ see, G.Jha, ed., Manusmṛti, vol.I, (Calcutta, 1932), p.387.

5. "Intense sin and super-virtue may manifest their effects even in this life. But in Hindu belief the main effect is on the future births." vide K.V.Rangaswami Aiyangar, "The Background of Manusmṛti, op.cit., p.73. Also see "Destroyed, Dharma destroys; protected, he protects." (Manu VIII.15), quoted in R.Lingat, op.cit., p.4.

On the other hand,

> "In internal terms, dharma signifies the obligation, binding upon every man who desires that his actions should bear fruit, to submit himself to the laws which govern the universe and to direct his life in consequence. That obligation constitutes his duty: and that is the further sense of the word."[1]

It may be correct to say that, in a sense, the obligation to submit to the laws of the universe, in those days, appeared similar in modern terms, to the principle of respect for the rule of law; and the śāstras seem, therefore, to have favoured rule of law in a wider sense. The gist of the matter is that man has been expected to lead a moral life as understood by the śāstras. The source of his rise or fall is his action.[2] In order to pay his debts fully, it is believed, he is subject to transmigration[3], until he has reached the final stage of

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1. Ibid.

2. It may be noted here that many writers have found defects and loopholes in this theory of karma; some have modified it and introduced the concept of Iśvara. Thus,

   Iśvaraḥ kāraṇam puruṣa karmāphalya-darśanāt // 19
   na puruṣa-karmābhāve phalā-niṣpatteḥ // 2o
   tat-kāritatvād ahetuḥ // 21

   Gautama-nyāyasūtra, IV.I.19-21, vide G.Jha, ed., (Poona, 1939), pp.25o-251; also, see F.Max Müller, The Six Systems of Indian Philosophy, (London/ Bombay, 1899), p.556. For further critical information, see E.W.Hopkins, 'Modifications of the Karma Doctrine', Journal of the Royal Asiatic Society, 19o6, pp.581-593; cf. V.S.R., Maharajah of Bahhili, ibid. (19o7), pp.397-4o1; and again E.W.Hopkins, ibid., pp.665-672; A.B.Keith, The Religion and the Philosophy of the Vedas & Upanishadas, (Oxford, 1925), pp.635-36; (for further references see below p.36 ff,where the subject of transfer of merit etc. is discussed in more detail).

3. K.V.Rangaswami Aiyangar, op.cit., p.74; q. Manu XII., 17-18,
   Tenānubhūya tā --- tāvevobhaumahaujasau //
   Sa jīvo vītakalmaṣaḥ / tānyeva pañcabhūtāni --- bhāgaśaḥ //

   Manu XII.22, i.e. "when body dies, the self first undergoes its appointed purgation by suffering for its lapses, and then re-enters the five elements composing the material body in new form." It may be noted, here, that the materialists did not believe in the existence of an antecedent life; see U.Mishra, History of Indian Philosophy, vol.I, (Allahabad, 1957), p.216.

life, i.e. moksa or 'heavenly bliss'.[1]

If one examines this morality closely, it would appear that

> "Its foundation and its sanction are religious, but it is essentially social in the sense that, in a social order visualised as one with the natural order, the individual who obeys its precepts performs a duty which is as much social as religious"[2]

Thus, looked at from this point of view, the realisation of dharma is necessary, and unless men put their duties, as envisaged by dharma, into effect, (i.e. fully meet their obligations), no realisation of dharma is possible. With this information in the background, we may, now, turn to our main enquiry into the father-son relationship.

Manu says that "One shall turn his mind towards liberation only after having paid off the three debts"[3]. What were those three debts? According to the Veda, a man is born burdened with three debts. He owes the study of the Vedas to the Rsis (sages), sacrifices to the Gods, and a son to the manes; and by studenthood (brahmacarya), by performing yajñas (sacrifices), and by procreating sons he frees himself from

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1. Regarding moksa see Manu VI.35, in f.n.3 below. Āpastamba, in regard to 'heavenly bliss' states, "The revealed texts declare --- a reward without end, which is designated by the term 'heavenly bliss'." Āpas.II.9.23.11, vide G.Bühler, S.B.E.2, op.cit., p.157; also see J.R.Gharpure, Teaching of Dharmaśāstra, (Lucknow, 1956), pp.36-39; R. Lingat, op.cit., p.4, f.n.5.

2. Ibid, p.4

3. Manu VI.35, vide G.Jha, op.cit., vol.III, pt.I, p.219; also, see Manu VI.36-37, ibid, pp.220-22.

those three debts respectively.[1] Thus, procreation of a son is one of man's three debts or obligations, which he has[2] to pay to his ancestors. The purpose of begetting the son has been very succinctly stated in the Ait, Br.33.1. It is stated there "A debt he payeth in him, and immortality he attaineth, that father who seeth the face of a son born living."[3] Thus, the purposes served by a son are payment of

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1. Jāyamāno vai brāhmaṇastribhirṛṇavā jāyate brahmacaryeṇa ṛṣibhyo yajñena devebhyaḥ prajayā pitṛbhya eṣa vā anṛṇo yaḥ putrī yajvā brahmacārivāsī /

   Tai. Saṁhitā VI.3.1o.5, vide A.S.Dhupkar, ed., (Aundh, 1945), p.316; see also, P.V.Kane, H.Dh., Vol.II, pt.I, (Poona, 1941), p.56o, f.n.13o2; M.L.Sandal, trans., Pūrva Mīmāṁsā, Jaiminisūtra, (Allahabad, 1923), p.325; Aitæeyabrāhmaṇa, 33.1, vide A.S.S. No. 32, (Poona, 1896), p.835; A.B.Keith, trans., Ṛgveda Brāhmaṇas, (Cambridge, Massachusetts, 192o), p.299; W.D.Whitney, trans., Atharva-Veda Saṁhitā, pt.1, (Cambridge, Massachusetts, 19o5), p.367; Sat.Brāhmaṇa, I.7.2.1, (and n.1) J.Eggling, trans., S.B.E.12, (Oxford, 1882), p.19o; Vasiṣṭha XI.48, vide G.Bühler, trans., S.B.E.14 (Oxford, 1882), p.56; Manu VI.36, & Medhā. on this verse quoting Satapathabrāhmaṇa, I.7.2.1, vide G.Jha, op.cit., p.22o; Baudhāyana II.9.16.7, vide G.Bühler, trans., S.B.E.14, op.cit., p.271; also, these debts are referred to at Manu V.257, VI.94, XI.66, vide G.Bühler, trans., op.cit., pp.169, 215 and 443 respectively; Viṣṇu 37.29, vide J.Jolly, trans., S.B.E.7, (Oxford, 188o), p.137; J.Jolly, Hindu Law and Custom, (trans. by B.Ghosh), cited above, pp.211-12; Mayne's Treatise on Hindu Law and Usage, 11th edn., op.cit., p.1o5; These debts are also referred to in The Buddha-Karita of Aśvaghosh, trans., by E.B.Cowell, S.B.E.49, pt.I, (Oxford, 1894), p.1oo.

   It may be noted that a life-long student or saṁnyasin was, it seems, excluded from the payment of debt (of procreating son etc.), see Vedānta-sūtra, III.4.17, vide G.Thibaut, trans. S.B.E.38, pt.II, (Oxford, 1896), p.295.

2. For these duties are essential and obligatory and are not left to choice; see,

   Brāhmaṇasya tu somavidyāprajamṛṇavākyena saṁyogāt /

   Jaiminisūtra, VI.2.31, vide M.L. Sandal, op.cit., p.325, also see P.V.Kane, op.cit., p.56o.

3. vide A.B.Keith, op.cit., p.299; also see,

   Ṛṇam asmin saṁnayaty amṛtatvam ca gacchati /
   pitā putrasya jātasya paśyec cej-jīvato mukham, iti //

   vide A.S.S. No.32, op.cit., p.835.

debt to the ancestors and the securing of immortality[1] and heaven. Moreover, it appears that as long as the process of procreation (of sons) continues, it is believed that it increases the contribution to the fame and heavenly bliss of departed ancestors. This seems to happen through the continuity of performance, according to the śāstras, of the religious rites.[2]

One is, however, likely to wonder at the credibility of such ideas, and there is no denying that it is impossible to prove whether the pitṛs really reap any fruit from the rites which their sons have performed for them. The explanation may lie in the natural parent-child relationship. It may therefore be argued that if looked at from a different point of view, this dilemma might be better understood. The existence of such an idea might have been the product of both faith and some real experience, subjective, of course, on the part of the performer. It is due to faith, in the sense that one believes and follows certain things because he is taught to do so; and one could hardly come across a faith which has not any practical foundation or use. In this case, the practical side of it (which is susceptible of proof by experience) might be assimilated with the resultant satisfaction of the son. This might be explained thus: generally, children are loved, cared for and brought up by their parents. Their kindness and affection might generate a feeling of gratefulness, and, as a result, the children feel

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1. This idea of achieving immortality seems to have been voiced in the Ṛgveda. "--- and may I be immortal by my children." Ṛg.V.4.1o, vide R.T.H.Griffith, trans., vol.II, (Benaras, 189o), p.193; even in the later age of the smṛtis like Manu IX.1o7, where in a slightly different context, the same idea is laid down. "That son alone to whom the man transfers his debt and through whom he attains immortality, is the 'duty-born son';" vide G.Jha, op.cit., vol.V., p.87; also, "He (the father) throws his debt on him (the son); and the father obtains immortality." Viṣ.XV.45, vide J.Jolly, op.cit., p.65.

2. "These (sons) ... increase the fame and the heavenly bliss ... of the preceding ones." Āpas.II.9.24.3-4, G.Bühler, op.cit., p.158.

a kind of obligation. Because they owe so much to their parents, their gratitude is generally reflected in their caring for the parents during their old age. This filial gratitude, in return, satisfies the parents, which might be construed as the sign of their contentment in the last days of their lives. In other words, such a stage of peace and happiness is possible only when a man has fulfilled his duties. Thus, in a circular way, every generation seems to have incurred this obligation towards its parents (and ancestors)[1], the basis of which seems to lie in the interactions of the natural parent-child relationship. In this sense, it would appear that the ṛṇa- (obligation or debt) principle, as envisaged by the śāstras, evidences the consciousness of moral obligation. Further, it may be pointed out that, the fact that the development and maintenance of one's career is owed to ones parents or ancestors instils a sense of duty impelling continuance of the same treatment to one's progeny. Thus, the sense of a moral duty is itself the dharma: a source of obligation or ṛṇa.

Thus, to continue our theme, i.e. continuity of performance of religious rites and the consequent spiritual benefit of the departed ancestors, it may be pointed out here that 'the son's close connection with the offering of piṇḍas to the ancestors is not much emphasized in the oldest works.'[2] Its prominence is visible in the sūtra and the smṛti literature[3], (see Manu IX.136). If this is true, then, why should those earliest

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1. For, even the pitṛs were expected to aid. "May the most glorious fathers aid us, --- rescue us from all distress." Ṛg.I.1o6.3, vide R.T.H.Griffith, op.cit., vol.I, (Benares, 1889), p.181, n.3 explains the term fathers (pitaraḥ) are the manes or spirits of departed ancestors. Also see, "we may support children, and children's sons." Ṛg.I.92.13, ibid.p.156.

2. P.V.Kane, H.Dh., vol.III. (Poona, 1946), p.642.

3. In this connection reference may be had to Jagannātha, vide H.T.Colebrooke, trans., Digest, vol.III, (Calcutta/ London, 18o1), pp.293-297, (verses 3o2 to 313).

scriptures impose this mandatory duty (see above f.n.2, p.24) of procreating a son on every man? In fact, the Satapatha-brāhmaṇa repeats again and again that the benefits to the ancestors accruing from the individual's Vedic study and other religious duties return to him by way of benefits conferred by the ancestors themselves.

Now, as has been stated, the debt to the manes is simply that of begetting a son; and accordingly, the matter should end there. Against this, the idea that the son enables the father to pay off the debt he owes his ancestors (see pp.22-23 above), appears somewhat strange, for it seems merely self-help. Perhaps it is the process and the happy (?) coincidence that begets the son, and not the son as such, that appears to be instrumental here in enabling the father to pay the debt. But even this interpretation seems to be absurd, especially in view of the universal yearning for a son in the Veda.[1] Why should the son be wanted so badly?

One suspects that there should have been something more to it than what is apparent just from the literal meaning of the term. Perhaps, the wider construction given to it, in the Ait.Br.33.1 (see above pp.22-23) confirms this. Let us enquire whether this construction has any foundation.

We come across a verse in the Ṛgveda[2] which clearly indicates that the son is 'canceller of debts'. The debt referred to here is one which his father owed to his progenitors.

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1. "To us be born a son, and spreading offspring. Agni, be this thy gracious will to us-ward." Ṛg.III.1.23, vide R.T.H.Griffith, op.cit., vol.I, p.4o9;
   "O' Dawn, enriched with holy rites --- we may support children, and children's sons." Ṛg.I.92.13, Ibid, p.156.
   "To him who worships soma --- a glory to his father." Ṛg.I.91.2o, Ibid., p.153
   In Ṛg.I.162.22, it appears to have implied that the sacrificer in return for his performing this sacrifice, expects both spiritual and temporal benefit including 'manly offspring' as well as freedom from sin. Ibid., p.28o.
2. Iyamadadādrabhasamṛṇacyutam --- dāśuṣe /
   Ṛg.VI.61.1, vide, P.V.Kane, H.Dh., op.cit., vol.III, P.415, n.674; also see R.T.H.Griffith, vol.I, op.cit., p.4o9.
3. Ibid., n.1

Further, we notice in the Atharva-veda[1] a reference to debts owed in this world. Does this mean that it refers to a secular debt? It would seem so;[2] for the word indicating the debts owed in this world is lokaḥ, in place of the term ṛṣis. Moreover in this context, it has been clearly pointed out that the term (anṛṇa) "has, here, both a sacred and a profane meaning, applying to what one owes to his fellow-men, and what duties to the gods."[3] This leaves hardly any doubt that secular debts were meant here.

So, from what has been laid down in the Ait.Br.(33.3),[4] i.e. 'by means of a son, one gets over one's obligations or worries (tamaḥ[5])'; it appears that the son has been looked at as the reliever of his father's worries and obligation - and in view of what is meant by obligations in Atharva-veda (VI.117.3) above, it seems almost certain that secular debts of the father would fall under this category. Thus, in view of this discussion, the wider construction given to the term

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1. Anṛṇā asminn anṛṇāḥ parasmin tṛtīye loke anṛṇāḥ syāma /
   ye devayānāḥ pitṛyāṇāśca lokāḥ --- kṣiyema //
   Ath.veda VI.117.3, vide V.Bandhu, ed., Atharvaveda, pt.II, (Hoshiarpur, 1961), p.826.

2. Keśava (on Kauśikasūtra, 46.36) quotes the three hymns (i.e. Ath.Veda VI.117.1-3, as accompanying the satisfaction of a debt after the death of a creditor, by payment to his son or otherwise. vide W.D.Whitney, op.cit., p.366.

3. Ibid., p.367. It may be pointed out here that though Whitney renders anṛṇa as guiltless, in the context, here, 'free from debt or obligation' is an appropriate meaning.

4. A.B.Keith, op.cit., pp.299-300;
   Śaśvatputreṇa pitro'tyāyanbahulam tamaḥ /
   ātmā hi --- sa irāvatyatitāriṇī,iti /
   Ait.Br.33.3, vide A.S.S. No. 32, op.cit., p.836.

5. It may be pointed out here that the term tamaḥ in this context seems to mean 'obligation' or 'worries' than 'darkness' as translated by Keith. Also, see L.R.Vaidya, The Standard Sanskrit-English Dictionary, cit. above, p. 304.

'debt to ancestors' in Ait.Br.(33.1) appears to be justifiable; and we may not be wrong in stating that the son, by then, was considered liable for his father's secular debts. In addition, to support this conclusion, it may further be stated, in view of what we have discussed above (see pp.16-17) in respect of the ancient families, as well as in respect of the concept of debt (pp.2o-22) that the closeknit family-ties, jointness of ownership, and absence of separate property might have brought about this result.

Let us examine this aspect, (i.e. the son was liable for the father's secular debts,) of the father-son relationship from a different point of view, as advanced by the śāstras. The śāstric view is that the son is nothing but his father re-born.[1] It hardly matters whether this view has its origin in the desire to perpetuate one's own or one's family's name, or the desire to secure spiritual benefit.

What really matters, however, is that its acceptance, despite the fact that some evidence is presented in its favour,[2] would

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1. Ait.Br.33.3,6, vide A.B.Keith, op.cit., pp.299-3oo; Also see, A.S.S.No.32, op.cit., pp.836-837; 'Therefore they say that he who begets a son produces even his own self; and it is declared in the Veda, "thou art self, called a son".' See, n.11 on Baudh. II.9.16.11, vide G.Bühler, op.cit., p.272;
'In thy offspring thou art born again, that, mortal, is thy immortality', Āpas.II.9.24.1, vide G.Bühler, op.cit., p.158; 'By themere birth of --- son, a man becomes 'with son'---", Manu, IX.1o6, G.Jha, op.cit., vol.V, p.87; even the materialists "hold that their son is their very self" (and support it with a śruti, i.e. Kauṣitaki Upaniṣada. I.ii; Śabarabhāṣya IV.iii.38); vide U.Mishra, op.cit., p.218; P.V.Kane, H.Dh., vol.III., op.cit., pp. 641-642.

2. "Now it can also be perceived by the senses that the (father) has been reproduced separately (in the son); for the likeness (of a father and of a son) is even visible; only (their) bodies are different."Āpas.II.9.24.2; vide G.Bühler, op.cit., p.158; also see, U.Mishra, op.cit., p.218.
Regarding sonship reference may be had to J.R.Gharpure, Hindu law, 4th edn., (Mad., Bom., 1931), p.98 ff.

lead to some conflicting results. Thus, it would support the view that the son is liable to pay all debts of his father, in the sense that the father himself would have done so; but, it seems to cancel the whole idea of the doctrine of the 'Pious Obligation', which will presently be discussed below (see pp. 36-45). For, how could one's own act done for the benefit of the same person be construed as a pious obligation of the son? Then again, we come across the maxim of Jāteṣṭi. Though in a different context, it clearly implies that the father and the son are two different selves in the sense that the fruit of Vaiśvānara sacrifice accrues to the son[1] (and not to the father.) It would appear, therefore, that there is hardly any unanimity among the śāstras as to this theory of the father and the son being one and the same. What in fact is meant by this theory might well be their oneness in the representative sense.

To sum up this discussion before we turn to the smṛtikāras, it may be conjectural that by the payment of three debts, originally, the sacred triple debts only might have been contemplated. But, as time passed on, as we have seen above (see pp.26-27), secular debts were gradually added[2] to this

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1. Although the author acknowledges the existence of another Vedic text 'Ātmā vai putraḥ', 'A son is one's own self': the fruit goes to the son by virtue of their being no relationship of a part to its whole. Vide M.L.Sandal, trans., The Mīmāṁsā Sūtra of Jaimini, (Allahabad, 1923), pp.238-239.

2. Actually the original list of three debts seems to have been amended so as to include new entries. See,
   Ṛṇaiś caturbhiḥ -- / pitṛ-deva ṛṣi-manuja-deyaiḥ
   śatasahastraśaḥ //
   M. Bh. I.111.12, vide V.S.Sukthanakar, ed., B.O.R.I., vol.I, part II, (Poona, 1933), p.493;

   Ṛṇam unmucya devānāmṛṣīṇām --- /
   pitṛṇām atha viprāṇāmatithīṇām ca pañcamam //
   M.Bh. XIII.37.18, R.N.Dandekar, ed., B.O.R.I., vol.XVII, pt. I, (Poona, 1966), p.250. Cf. P.V.Kane, H.Dh., vol. III, op.cit., pp.415-416, f.n. 675. Also see, Satapatha Br. I.7.2.1, op.cit., p.190; Prajāpati q. in Ap.II.9.24.7-8, op.cit., p.158; Baudhāyana II.6.11.34, vide G.Bühler, trans., S.B.E.14, (Oxford, 1882), p.262. For similar obligation, see also, Gaut.V.3, vide S.B.E.2, op.cit., p.198; Manu III.69-72, vide G.Bühler, S.B.E.25, op.cit., pp.87-88; IV.19-21, at pp.131-132.

list and the son was expected to pay such debts of his father.

When we come to consider the views of the sūtras and the smṛtis, we enter into an obscure situation. Obscure because, on the one hand, the sūtrakāras and the earlier smṛtikāras like Gautama, Vasiṣṭha, Manu, as against the later smṛtikāras like Yājñavalkya,[1] Nārada,[2] Kātyāyana,[3] seem not to have positively attributed this liability to the son;[4] but on the other hand, all of them lay down in very clear language, that certain secular debts of the father need not be paid by the son, and on this point, both the dharmaśāstra and the arthaśāstra are in agreement.[5]

Now, this situation has led certain[6] writers to conclude that in view of the earlier śāstrakāras, the son is not liable to pay his father's secular debts, because of the absence of any positive rule to that effect. According to them, his liability extends only to the religious debts. These arguments

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1. Pitari proṣite prete --- vā / putra pautrairṛṇam deyam --// Yājñ. II.5o, vide Dharmakośa, op.cit., p.684; J.R.Gharpure, trans., op.cit., p.792.

2. Na putraṛṇam pitā dadyāddadyātputrastu paitṛkam / Nār. IV.8, vide Dharmakośa, op.cit., p.695; also see J.Jolly, trans., S.B.E.33, (Oxford, 1889), p.45 (verse 1o).

3. Vidyamānepi --- vā / viṁśātsaṁvatsarāddeyam ṛṇam pitṛkṛtam sutaiḥ // Kātyā. 548, vide P.V.Kane, ed.& trans., cit.above, p.69; trans., p.227. (Also see Kātyā. 549, 55o).
Also, "If he who --- that debt shall be discharged by sons or grandsons." Viṣ.VI.27, vide J.Jolly, trans., op.cit., p.44; also see Bṛ.XI.49.

4. R.K.Ranade, (195o) 52 Bom.L.R.,J., p.1. The writer argues that these writers of B.C. period do not saddle son etc. with the pious obligation in this respect.

5. Reference may be had to Gaut.XII.38, vide Dharmakośa, op cit., p.677; Vasiṣṭha XVI.26, Ibid., p.678; Kauṭilya III.16, Ibid., p.68o; (or according to R.P.Kangle, Kauṭ.III.16.9, see his trans., pt.II, (Bombay, 1963), p.281); Manu VIII.159, Ibid., p.663; Yājñ. II.47, Ibid., p.685; Bṛhaspati quoted at p.7o8, Ibid; Nārada IV.1o, Ibid., p.695; Vṛddhahārīta 7.249, Ibid., p.715.

6. R.K.Ranade, op.cit., p.1; also in (1953) 55 Bom.L.R., J., 94, at pp.96-97; also see an anonymous article in AIR 1923, Journal & P.C., J., pp.71-8o at p.79.

are, however, apparently of doubtful validity. For, in the first place, according to Manu VIII.160, "the heirs should pay the surety-money if the father had stood surety for payment;" and the surety-money is undoubtedly a secular debt. According to the arthaśāstra, too, "sons shall pay the debt with interest of a deceased person, or heirs inheriting the property."[2] Secondly, what does the presence of express denial of the son's liability, in respect of certain secular debts of the father, indicate? Does it serve any purpose in the absence of any positive rule to the contrary?

It is respectfully suggested that the presence of this injunction itself indicates the existence[3] of the rule that the sons were, in the first place, liable, even in the view of the earlier writers, to pay the secular debts of their father; and the later śāstrakāras seem to have merely confirmed this rule, already in existence.

If that is so, then, the son appears to be liable, generally, for the father's debts, irrespective of their nature; sacred or secular. Thus, there is hardly any doubt that in view of all the śāstrakāras, this rule has been applicable to the son.

Now, let us deal with an interesting but apparently discounted point of view. According to this view, the liability is attached to sons, it seems, "because they are sons, that is, because they are assets of the deceased,"[4] ..... This view appears to

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1. Vide G.Jha, Hindu Law in its Sources, I, (Allahabad, 1930), p.207.
2. Kauṭ. III.11.14, vide R.P.Kangle, pt. II, op.cit., p.262; Cf. Kauṭ. III.11.17-18, Ibid., p.263.
3. Also see Ait.Br.33.3, Atharvaveda VI.117.3 (cited above at pp.28-29), where the secular debt of the father has been referred to, and that proves its existence.
4. An anonymous article 'The doctrine of Antecedent debt', op.cit., at p. 78; also see K.S.Mathur, 'The doctrine of Antecedent debt in Hindu Law', AIR 1937 Journal & P.C., 49.

rest on misinterpretation[1] of certain śāstric texts. True, it has been stated that the son (among others) might be given, sold or abondoned;[2] but this might well be the position in the cases of extreme necessity;[3] for, at the same time, we come across rules to the effect that the right of gift or of sale of one's own child was not recognised.[4] Again, if this theory is accepted, why should a liquor-seller etc. be deprived of his dues from such a slave-owner: the father? Further, suffice it to say therefore, that in the view of the śāstras this idea had hardly any place, and hence has never been accepted by the modern jurists or the Courts.

At this stage, it would be appropriate to determine the basis of this liability of the son. Now, from what we have discussed so far, it would appear that it lies in religious faith as well as in one's own moral duty. It lies in religious faith because a Hindu believes (as we have seen above pp.2o-22) that a man qualifies for heavenly bliss only after he has freed himself from all his obligations; both sacred and profane. If a man dies indebted, it is believed that his son would relieve him of the spiritual burden by paying his debts,[5] thus adding to the spiritual benefit of the father. It lies in moral duty, for the son acquires, simply by birth, a right in the ancestral and the joint family property (see above p.18). Besides, the kind treatment etc. received from the parents creates a kind of moral obligation to the effect that it appears just and proper that the son sould repay such debts.

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1. J.Jolly, History of the Hindu Law, op.cit., pp.81-82; here, Jolly clearly states that that the father can sell his son at will. Especially, his interpretation of Manu VIII.416 is misleading. Cf.Medhā. on Manu VIII.416, vide G.Jha, op.cit., vol.IV.pt.2, pp.434-35.
2. Vas.XV.2, "(Therefore) the father --- have power to give, to sell and to abondon their (son)," but, this should be read with Vas.XV.3-4, - "But let him not --- the ancestors". Vide G.Bühler, op.cit., p.75.
3. J.Jolly, op.cit., p.83; J.D.M.Derrett,'Indica pietas:a current rule derived from remote antiquity,' at Zeitschrift der Savigny-Stiftung Rechtsgeschichte, Rom.Abt., vol 86,(1969)37,p.47.
4. "The gift --- and the right to sell -- not recognised." Āpas.II.6.13.11, vide G.Bühler, op.cit., p.131.
5. 'Fathers wish to have sons --- he will release me from all obligations towards superior and inferior beings'. Nār.I.5, vide J.Jolly, op.cit., p.42; also see, Vyavasthā-candrikā, of S.C.Sarkar, vol.II, (Calcutta, 188o), p.2.

This brings us to the views of the commentators. Here again, we find no one opinion. Thus Viśvarūpa[1] (on Yājñ.II.51) says that, "the son of one who has left no property shall not be liable, ---- for debt follows assets."[2] But, according to the Mitākṣarā (on Yājñ.II.5o), it shall be paid "even when there exists no property of the father, in their capacity as son and grandson."[3] Devaṇṇa-bhaṭṭa,[4] quoting Kātyāyana, appears to agree with the view of Viśvarūpa, while Nilkaṇṭha-bhaṭṭa,[5] quoting another verse of Kātyāyana, says that 'even in the absence of paternal wealth the son is liable to pay his father's debt.' It may be pointed out here that in fact Devaṇṇa-bhaṭṭa refers to both[6] the verses of Kātyāyana which seem to be contradictory. Actually, the contexts in which these should be applied differ.[7] Aparārka (on Yājñ.II.51), glosses that ṛktha-grāha (one who has received the estate) does not apply to the son, 'hence, he seems to support Vijñāneśvara;[8] so does Mitra Miśra. According to him, "the son must pay with interest whether he takes the estate or not; in the absence of a son the grandson must pay with interest if he takes the estate, but the capital only if he does not; the great-grandson need not pay even the capital if he does not take the estate."[9] This is how the commentators see the problem.

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1. Na tvadravyasyaiva putro dadyāt / ṛṇasya dravyānusāritvāditye tat prāgeva jñāpitam /
   vide Dharmakośa, op.cit., p.686.
2. Vide K.P.Jayaswal, Manu and Yājñavalkya, (Calcutta, 193o), p.193; also see, R.K.Ranade, op.cit., p.2.
3. Ibid., also see, J.R.Gharpure, op.cit., p.792.
4. Vide J.R.Gharpure, trans., The Smṛticandrikā, Vya.Kaṇḍa, pt. II, (Bombay, 195o), p.319.
5. Vide V.N.Mandlik, trans., Vyavahāra-Mayūkha, (Bombay, 188o), p.112; Borradaile, trans., Vya.-Mayūkha, (Madras, 1879), p.116; P.V.Kane, trans., Vya.-Mayūkha, (Bombay, 1933), p.216.
6. Vide J.R.Gharpure, op.cit., pp.318-319.
7. Vide P.V.Kane, ed.& trans., cit. above, pp. 7o and 229.
8. Vide K.P.Jayaswal, op.cit., pp.192-193, also see Dharmakośa, op.cit., p.688.
9. J.D.M.Derrett, 'Indica pietas', op.cit., pp.37-66, at p.46, n.22.
   Putreṇa rikthagrahaṇāgrahaṇa yoḥ --- prapautreṇa tu rikthāgrahaṇe mūlamapi na deyam /
   Vide V.P.Bhandari, ed., Vīramitrodaya, Vya.prakāśa , vol.VII, (Benares, 1932), p.264; also see, P.V.Kane, H.Dh., vol.III, op.cit., p.445, f.n. 749.

From the point of view of our study, the view of the Mitākṣarā is very important in the sense that it is his (i.e. Vijñāneśvara's) interpretation (of Yājñ.II.5o) which is at the root, or so it appears, of what is known, these days, as the doctrine of the Pious Obligation; though, the germs of this idea have, it would appear from the above discussion (see p.22 ff), in a sense, been in existence throughout the period since the notion of ṛṇam, and the devices by which it could be paid, developed.[1] In Vijñāneśvara's view,[2] 'a son who has attained the age of majority, leaving aside his personal interests, should free his father from debts by (all) efforts, so that he may not (have to) go to hell.' Thus, the purpose for which Vijñāneśvara wants the son to pay his father's debt by all means at his command, is to save him from going into hell due to his indebtedness; and this the son should do without any selfishness. In a sense, this purpose seems to be more of a socio-religious nature, for the repayment saves the family from loss of prestige in the society as well as serving the religious purpose of saving the father from spiritual punishment. It is for this reason that it is a son's pious duty to pay his father's debt; and he should fulfil it, in the view of the Mitākṣarā, even if he receives no property[3] from his father.

Thus, in view of the śāstras, as interpreted by the Mitākṣarā, the father-son relationship gives, on the one hand, the son a right by birth in the ancestral and joint family property,

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1. J.D.M.Derrett, 'Indica Pietas', op.cit., at pp.37-38, expresses the opinion that the P.O. seems to have been in existence between 15oo and 9oo B.C..
2. Ataḥ putreṇa jātena svārthmutsṛjya yatnataḥ / ṛṇātpitā mocanīyo yathā na narakam vrajediti / putreṇa vyavahārajñatayā jātena niṣpanneneti vyākhyeyam / Mit. on Yājñ.II.5o, vide B.S.Moghe, ed., Yājñavalkyasmṛti, Vyavahārādyāya (with the) Mitākṣarā, (Bombay, 1879), p.1o5.
3. It may be noted that by the Hindu Heir's Relief Act, (Bombay Act VII of 1866) the son's liability is, now, limited to the extent of the assets that come to his hand, the same is the law laid down in the other parts of India by judicial decisions.

but imposes, on the other hand, a pious duty upon the son to pay his father's dhārmic or just debts: both sacred and profane.

We shall now turn to the function of the so-called 'Pious Obligation'.

1.4 THE FUNCTION OF THE PIOUS OBLIGATION

In the course of above discussion, we have noticed how the notion of ṛṇa or obligation developed into various religious and secular debts. Also, we came across the process by which the ancient idea of getting rid of obligations of a religious nature, through sons (Ṛg.VI.61.1 etc.), was later assimilated and applied to that of secular liability. The payment of these spiritual or secular debts is necessary to avoid the evil consequences arising from their non-payment; for "the non-payment of debts"[1] is an offence (sin).[2] We have also seen (see p.22) above the various methods of repayment of these debts, devised by the developed śāstras. Thus, the doctrine of the Pious Obligations is one of many such devices,[3] the basis of which lies in the religious and moral obligation of the son to pay his father's debt. But how does it operate and what is the scope of this doctrine?

This liability imposed upon the son, under the doctrine of the Pious Obligation, would hardly make any sense, unless we examine how the father benefits spiritually from the son's meritorious deeds. To sustain the Pious Obligation, therefore, one has to inquire into whether merit is transferable.

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1. Manu XI.65, vide G.Jha, op. cit., vol.V, p.392; according to Medhātīthi the term 'debt', here, "refers to the non-performance of those acts that have been laid down as paying off the 'four debts' (to the Gods, the Pitṛs, the man and the fires).", vide, Ibid, pp.392-393.
2. "To omit to perform the act enjoined brought sin in any event, and sin brought misfortune in this life and the prospect, if not expiated personally or vicariously, of unhappy births hereafter." J.D.M.Derrett, R.L.S.I., op.cit., p.77; also see his 'Indica pietas', op.cit., p.44.
3. Besides the methods already mentioned, the following few may be added to the list. "By open confession --- a sinner may be released from his guilt, ---." Manu q.by Jagannātha, vide H.T.Colebrooke, op.cit., vol.I, p.319.

It would appear that there has always been a popular opinion that both merit and demerit are shared between father and sons. Thus, in Ṛgveda, we find evidence to the effect that sons would benefit from their 'gracious fathers' (Pitraḥ), [1] while, on the other hand, the sons are praying for saving themselves from the sins committed by their fathers.[2] This would not have been so, had there not been such a belief as this prevalent in the society of the day. Manu appears more explicit. According to him,

> "If not on himself, then on his sons, if not on his sons, then on his grandsons (falls the punishment); an unrighteousness, once committed, never fails to bring its consequences to the perpetrator." [3]

He says both dharma and adharma affect the man or his

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1. "May the most gracious fathers aid us." Ṛg.I.1o6.3, vide R.T.H.Griffith, op.cit., vol.I,p.181.

2. "Loose us from sins committed by our fathers." Ṛg.VII.86.5, Ibid., vol.III, (Bombay, 1891), p.1o6; also see, P.V.Kane, op.cit., vol.IV, (Poona, 1953), p.5. Cf. "May Agnee free me from the sin which my mother or father committed when I was a babe unborn." Tai.Br.III.7.12.3 q. by R.T.H. Griffith, op.cit., vol.II, (Bombay, 189o), p.395, n.7.

3. Manu IV.173, vide G.Jha, op.cit., vol.II, pt.II, (Calcutta, 1921), p.436;
Yadi nātmani putreṣu na cetputreṣu naptṛṣu / na tveva tu kṛto dharmaḥ karturbhavati nisphalaḥ //
M.IV.173, vide G.Jha, ed., op.cit., vol.I, (Calcutta, 1932), p.387. In respect of the term Kṛto dharmaḥ, Medhātīthi says, "Whether the component words be read as 'Kṛtaḥ-dharmaḥ' or 'Kṛtaḥ-adharmaḥ', the resultant conjunct form would be the same - Kṛto-dharmaḥ; hence both dharma (righteousness) and adharma (unrightecusness) are meant to be spoken of (as not failing in bringing up their consequences).
This verse is quoted in the Vīramitrodaya, Paribhāṣā-prakāśa, which adds Kṛtodharmaḥ should be construed as kṛtoḥ adharmaḥ as the context deals with adharmaḥ (adharmaḥ iti chedastatprakaraṇapāṭhāt /) vide P.N. Sarma, ed., the Vīramitrodaya, Paribhāṣāprakāśa, (Benares, 19o6), p.68. It may be noted here that the commentator appears to deny what Manu says, and thinks that Karma only affects the doer. He says the principle of the Vaiśvānara sacrifice is not applicable here. Vide G.Jha, op.cit., vol.II, pt.II, p.437; also, see G.Jha, Manusmṛti, Notes, II, (Calcutta, 1924), p.318.

descendents. In fact, this verse is good evidence of the popular notion, mentioned above, that sin as well as merit, are vicarious and affect sons and grandsons. Of course, this belief has not been confined to the father-son relationship only. We come across examples such as the king[1] sharing both pāpa and puṇya - demerit and merit - with his subjects; a Brāhmaṇa's[2] (Agnihotrin) merit going to his creditor, should he die without paying his debts. Thus, the cause of transfer of merit or demerit has connection with one's failure or otherwise of one's own obligation: religious or secular.

Medhātīthi, while commenting on Manu IV. 173, (see f.n.3, p.37), refers to the principle of the Vaiśvānara sacrifice, and states that it does not apply in this case. In fact, the principle involved,[3] according to the maxim of Jāteṣṭi nyāya[4],

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1. Baudh., I.1o.1, vide G.Bühler, trans., S.B.E.14, (Oxford, 1882), p.199; Manu VIII.3o4-3o8, vide G.Bühler, op.cit., pp.3o7-3o8; Yājñ. II.335-337, and both the Mit. and the Vīr. on these verses, vide J.R.Gharpure, trans., op.cit., vol.II, pt.II, (Bombay, 1937), pp.597-6oo; the M.Bh.(Śāntiparva), 77.4.34; 91.41, vide M.N.Roy, trans., (Calcutta, 19o3), pp.114-115 and 136. In Poona critical edn. these chapters are no.78 and 92 of the 12th parva (i.e. Śāntiparva), cit. above, pp.367, 371 and 439. Cf. Kauṭ.III.16.25-27, there is no mention of sin; vide R.P.Kangle, op.cit., pt.II, p.282. Also see, M.Hara, 'Transfer of Merit', Adyar Liabrary Bulletin vol.31-32, 1967-1968, p.382.

2. "If an ascetic --- dies without discharging his debts, the whole merit --- belongs to his creditors." Vyāsa q. in the Vyavahāra-Mayūkha, vide V.N.Mandlik, trans., (Bombay, 1880), p.112; P.V.Kane, H.Dh., vol.III, op.cit., pp. 416-17, also see f.n.676 on p.417.

3. Vaiśvānaram dvādaśakapālam nirvapet putre jāte // Tai. Saṁ.2.5.3, q. in the Mīmāṁsā-sūtra of Jaimini, IV.3.38, vide M.L.Sandal, op.cit., p.239; Also it has been referred to in the Vīrm., Vya.pra., vide V.P.Bhandari, op.cit., p.253; the Dattaka-Mīmāṁsā, vide S.Marulkar, ed., A.S.S. 116, (Poona, 1954), p.136; P.V.Kane, H.Dh., op.cit., vol.V, pt.II, p.1343; S.N.Naraharayya, trans., Yājñavalkyasmṛti with the Mitākṣarā, (Allahabad, 1913), p.178, n.(k).

4. Vide M.L.Sandal, op.cit., pp.238-39; Mit. on Yājñ. II.56, vide B.S.Moghe, op.cit., p.119; N.P.Paravatiya, ed., Vyavahāra-Bālambhaṭṭi, (Benares, 1914), p.216; Subodhini (on the Mit.), vide J.R.Gharpure, trans., Subodhini, (Poona, 193o), p.76; P.V.Kane, op.cit., p.1343; S.N.Naraharayya op.cit., p.178, it may be noted here that ref. to Jai.IV.3.36, in n.(k) is, perhaps, a printing mistake, it should read Jai.IV.3.38.

means that though the performer of the sacrifice is the father, the fruit accrues to the son that is born. Thus, the maxim of Jāteṣṭi might be taken as an appropriate authority for the proposition that the fruit of one man's ritual accrues to another.

Now, if one performs a ritual or sacrifice, and the fruit of it can accrue to another, then, if the payment is analogous to a ritual, in the sense that Mīmāṁsā would seek for an analogy, payment by B can achieve apūrva,[1] adṛṣta[2] for A.

Historically, however, not everyone has been a willing follower of this ideology. It would appear that from very early times deleterious and unfair aspects of this notion struck scholars and mystics, especially under the influence of reactions against Cārvāka Philosophy: the Materialism. The Materialism, where one senses an element of caricature of the Cārvāka position, plainly denounced the authority of the Vedas. According to this view, 'while life remains let a man live happily, let him feed on ghee (purified butter) even though he runs in debt .'[3] It would appear that this philosophy believed that one could accumulate debts irresponsibly, and since, in its view, there was no antecedent life,[4] and hence, no rebirth and no karma, one could leave one's issue to pay each and every debt.

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1. Apūrva means 'unknown', merit and sin as the cause of future happiness or misery. Vide L.R.Vaiśya, cit.above, p.42.

2. Adṛṣta means 'invisible', 'unforeseen', 'destiny', 'fate' etc., Ibid., p.13. Both these terms are used here in the sense that they mean the remote or unforeseen consequences of the rite performed (for the benefit of others.)
   Also, it might be worthwhile mentioning here the existence of another method of gaining spiritual merit for oneself, relatives or superiors (involving the same principle of transfer of merit) from the Deity; see.G.Sontheimer, 'Religious Endowments in India: The Juristic Personality of Hindu Deities'; Zeitschrift für vergleichende Rechtswissenschaft, 67, pt.I, (1965), pp.45-100, at pp.71-72.

3. S.Radhakrishnan, Indian Philosophy, vol.I, (London, 1923), p.283.

4. U.Mishra, History of Indian Philosophy, vol.I, (Allahabad, 1957), p.216.

It is to combat this philosophy, perhaps, that the śāstric view developed that each man is responsible for his own sin. Of course, even in the Ṛgveda we come across such ideas as this: "May we not have to enjoy (i.e. suffer for) the enas (sin) committed by another".[1] This prayer clearly indicates the feeling that men may be relieved of the consequences of another's sins. In the sūtras and the smṛtis we find some conflicting views,[2] but Medhātīthi[3] on Manu (X.91), leans in favour of the view that, "the results of good and bad acts always accrue to the man who does them." According to Parāśara-smṛti, too, this should be so; because in the Kali-age only the perpetrator himself[4] (is abandoned as patita). Thus, in the view of the śāstra, the sinner, and no other person, is responsible for his sin. His merits and good might be shared, however, (as is the popular view), but sin was personal.[5] We will return to this point later at an appropriate place.

Whatever might have been the exact position of the śāstras on this question (which might have depended on every writer's own choice of a particular faith), one thing, on which most of them appear to agree, is this ancient belief that merit and demerit were transferable from one to another; and the fact that, even today, this belief strongly exists among the

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1. Mā eva eno anyakṛtam bhujem mā tatkarma vasavo yaccayadhve / --- . Ṛg.VI.51.7, vide L.Sarup, ed., Ṛgveda-saṁhitā, (Benares, 1955), p.638; also see R.T.H.Griffith, trans., op.cit., vol.II, p.395; (and f.n.2, on p.37 above); P.V.Kane, op.cit., vol. IV, p.6.

2. "Those among these (sons) who commit sin, perish alone, (but not their ancestors.)" Ap.II.9.24.9, vide G.Bühler, op.cit., p.158; while Manu says, "If one does with secamum ---- , plunges into the ordure of dogs, along with his ancestors." Manu X.91, vide G.Jha, op.cit., vol.V, p.315.

3. Ibid., pp.315-16. Also see, A.Avalon, trans., Mahānirvāṇa Tantra, 3rd.edn., (1953), p.363, wherein it is stated that, "as men go to hell by reason of their own sins, so they are bound by their individually incurred debts and others are not." Note: the authenticity of this work is doubtful; see J.D.M.Derrett, 'A Judicial Fabrication of Early British India', Z.V.R., 69/2, (1968), pp.138-181.

4. Tyajedadeśam kṛtayuge tretāyām grāmamutsṛjet /
dvāpare kulamekam tu kartāram tu kalau yuge //
Parā. I.25, vide D.Shrivasudeva, ed.& trans., (Hindi), Parāśarasmṛti, (Benares, 1968), p.5; also see P.V.Kane, op.cit., vol. IV, p.26.

f.n. 5 on the next page.

majority of Hindus, almost compels us to accept it. Of course, this idea has not been foreign to other faiths.[1] So far as we are concerned, however, if we accept the notion that merit is transferable from one person to another, then the operation of the doctrine of the Pious Obligation may be seen from a similar point of view. With this background knowledge about the Pious Obligation, we may first turn to our inquiry into its scope and implications from the śāstric point of view.

It has been already noted above (see p.21) that the philosophy of Hindu life is essentially a socio-religious morality. Moreover, while discussing the Mitākṣarā joint family, and the father-son relationship, we found that the son has, by birth, an equal right in the ancestral and the joint family property with his father; and that by birth alone he incurs the liability to discharge his father's dhārmic or just debts, due to his religious and moral obligation to save his father from spiritual pains ensuing from his indebtedness. This faith persisted throughout the period under study and it is evident especially among the rural population of the country even to this day.

Perhaps, having this situation in mind, it might be true to say that generally, "the Pious Obligation, originally, was a socio-psychological obligation recognised to bind any son, son's son (hereafter called 'grandson'), or son's son's son (hereafter called 'great-grandson'), whether legitimately born or adoptive, to pay the just debts of his deceased male lineal ancestor. It was this, no more and no less."[2] It would appear,

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f.n. 5 from the last page: In Adhyātma Rāmāyaṇa (II.6.42-88) we find, in respect of Vālmiki, that when Vālmiki asked his son and wife etc., whether they would share his sin, they replied, "This sin is your responsibility. We share only the enjoyment of wealth that you make by your (unrighteous activities)." Vide Bulcke (Camille), Rāma-Kathā, (Hindi), 1950, p.39

1. M.Hara, op.cit., p.411; Also see, "Mosaic law no doubt contemplated that the sins of the fahters should be visited on the children unto third or fourth generation, ---." Vide H.F.Morris and J.B.Read, Indirect Rule and the Search for Justice, (Oxford, 1972), p.177; also see J.D.M.Derrett, 'Allegory and the wicked Vinedressers' at The Journal of Theological Studies, N.S., vol.XXV, (Oxford, 1974), pp.426-431.
2. J.D.M.Derrett, op.cit., 'Indica pietas', p.43.

however, that a son who is 'incapable of undertaking his father's responsibilities due to his incurable physical or mental disability', is not held liable[1] for his father's debt; otherwise, of course, he is liable. So far as the grandson is concerned, the position is that of the son, but according to Bṛhaspati,[2] the son pays both the capital and the interest, while the grandson pays only the capital. Other smṛtis do not, however, seem to contain such a distinction. When we come to the great-grandson, we are faced with confusing statements. In the first place, not a single śāstrakāra has categorically stated that the great-grandson of the debtor is to pay his debt. Bṛhaspati[3] says that the great-grandson is not liable,

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1. Ṛṇam tu dāpayet putram yadi syānnirupadravaḥ /
dravyārhaśca dhuryaśca nānyathā dāpayetsutam //
Kātyā.557, vide P.V.Kane, op.cit., p.7o. According to the Smṛticandrikā, if the sons are incompetent - due to incurable disease or the like, --- are not liable for the payment of the father's debt; vide J.R.Gharpure, op.cit., p.318. Cf. Hemacandra's Arhannīti, according to which sons must pay the father's debt, but impotent, blind or deaf-and dumb sons need pay only when wealth from their father has reached them (i.e.,when they inherit). See M.N.Dosi, trans., (Ahmedabad, 19o6), p.84, verse 22:
Satsu putreṣu tenaiva ṛṇam deyam sutena ca /
yena pitṛvasu prāptam klībāndhavadhirādiṣu //

2. Ṛṇamātmīyavat pitrām putrair deyam vibhāvitam /
paitāmaham samam deyam na deyam tatsutasya tu //
Bṛ.q. in the Vivāda-ratnākara, vide P.V.Vidyalankara, op.cit., p.49; G.Jha, Hindu Law in its Sources, I, (Allahabad, 193o), p.21o; cf. Kātyā. q. on p.2o8 where he also lays down a similar rule. The Vivāda-ratnākara, op.cit., is quite clear on this point at p.49.

3. Prapautreirna deyamityarthaḥ, the Vivāda-ratnākara on Bṛ.;(see f.n. 2 above); also q. in the Mit. on Yājñ.II.5o, vide J.R.Gharpure, op.cit., p.794.

while Viṣṇu[1] leaves it to his option. Nārada[2] and Kātyāyana[3] appear of the opinion that 'the obligation to return a debt ceases from the fourth.'[4] Now, whether the debtor is to be included or not in this calcutation is not clear. In the absence of any positive rule indicating his inclusion, it would appear, in view of Bṛhaspati's statement, that he should not be included, i.e., the great-grandson is thereby excluded from the liability. This is, however, not so. For, the Mitākṣarā (on Yājñ II.5o) cites Bṛhaspati, referred to above, and glosses that, "The great-grandson is not liable to pay when he has received no property."[5] The Vīramitrodaya has a similar view (see above p.34, f.n.9). Asahāya on Nārada (I.4-6) appears to have arrived at the same conclusion, referring to the principle 'liability follows the assets',[6] and 'conferring

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1. Dhanagrāhiṇi prete --- tatputrapautrairdhanam dayam nātaḥ paramanīpsubhiḥ //
Viṣ.VI.27-28, G.Jha, H.L.S., op.cit., p.2o9; the Smṛticandrikā vide J.R.Gharpure, op.cit., p.322; J.Jolly, trans., op.cit., pp.44-45.

2. Kramādavyāhatam -- / taccaturthānnivarttate //
Nār. q. in the Vivāda-ratnākara, op.cit., p.49; The Smṛti-candrikā, vide J.R.Gharpure, op.cit., p.322; G.Jha, H.L.S., op.cit., p.2o9.

3. Pitryabhāve --- yatnataḥ/ caturthena -- nivarttayet //
Kātyā. q. in the Vivāda-ratnākara, op.cit., p.49;
Kātyā.56o, vide P.V.Kane, ed., op.cit., p.7o; also, the Smṛticandrikā, op.cit., p.322.

4. P.V.Kane, H.Dh., vol. III, op.cit., p.443.

5. Vide J.R.Gharpure, trans., op.cit., p.794.

6. According to Asahāya, the term grandson, here, must be taken to mean the grandsons of the debtor's son, i.e., the great-grandson. See J.Jolly trans., op.cit., pp.42-44, notes 4-6; also, P.V. Kane, H.Dh., vol.III, op.cit., pp.443-444; J.D.M.Derrett, 'Indica pietas', op.cit., p.46, n.22; J.R.Gharpure, trans., The Smṛticandrikā, op.cit., p.322, n.2. Also, the actual case cited by Asahāya may be referred to in this respect. See P.V.Kane, trans., Kātyāyana-smṛti, op.cit., pp.229-232, n.56o; for similar view, see also, The Vyavahāra-Mayūkha, V.N.Mandlik, ed.& trans., (Bom.,188o), p.113. Cf. the trans. of the same by P.V.Kane and S.G. Patwardhan, (Bom., 1933), p.218.

spiritual benefits to upto great-grandfather'.[1] The position, therefore, appears to be this: that if the great-grandson receives property, then he is liable.[2] If this is so, then, the rule "is equitable in that it is the holder of the property of the deceased person who is in general liable for his debts."[3]

There is, however, an exceptional rule laid down by Vyāsa,[4] according to which, so far as the suretyship debts are concerned, it is only the son who is liable; but only for the capital, and not the interest. Accordingly, the grandson and the great-grandson seem to have been exempted from this liability.

Thus, it is quite clear that, except for the great-grandson, the male issue were considered liable for debts of their father or grandfather even if they received no assets from them.[5]

When did the liability arise? The śāstras have laid down certain conditions in this respect. Thus, according to Yājñavalkya, "when the father has gone abroad, is dead or is immersed in difficulties --- his debt should be paid by the sons ---."[6] Nārada[7] explains that unless twenty years are

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1. Nārada I.6, vide J.Jolly, op.cit., pp.43-44; P.V.Kane, H.Dh., vol.III, op.cit., at pp.443-44, discusses this point after citing various authorities.
2. P.V.Kane, Kātyāyanasmṛti, op.cit., p.232, n.; J.D.M.Derrett, 'Indica pietas', op.cit., p.46.
3. Ibid., p.47.
4. Vyāsa q. in the Vīramitrodaya, (on Yājñ.II.5o), vide J.R.Gharpure, trans., op.cit., p.795; also see the Smṛti-candrikā, vide J.R.Gharpure, trans., op.cit., pp.283, 321; Kātyā.561, vide P.V.Kane, trans., op.cit., pp.232-33; for the further discussion reference may be made to J.D.M.Derrett op.cit., pp.47-48.
5. The Mit. on Yājñ. II.5o, vide J.R.Gharpure, op.cit., p.792.
6. Ibid.
   Pitari proṣite prete vyasanābhiplute'pi vā/putrapautrair ṛṇam deyam -/, Yājñ.II.5o, vide Dharmakośa, cit.above, p.684.
7. Nār. q. in the Mit. (Yājñ.II.5o), vide J.R.Gharpure, op.cit., p.792; also see Kātyā. 548, vide, P.V.Kane, trans., op.cit., p.227; also Viṣṇu. VI.27 (see f.n. 1, p.43 above and f.n. 2, p.45 below).

lapsed the liability does not arise in such cases. The Mitākṣarā (on Yājñ.II.5o) states that, even in the case of death, a son should not pay before he reaches the age of majority.[1] Apparently in this case, the liability of the son is merely inchoate which, when he reaches majority, becomes legally operative. Then again, the death could be real or civil, in the sense that the father has renounced the world.[2] Besides, Kātyāyana says that even if the father is alive but afflicted with incurable disease or incapable due to madness, or old age, or guilty of grave sin etc., his debts should be paid by sons.[3]

This it seems that only in these circumstances the liability to pay arises, and hence the son may be required to pay his father's debt under the Pious Obligation. In a case, however, where a son is faced with the payment of his own debt, and that of his father and grandfather, the order of payment appears to be: first, the grandfather's debt and then his father's, and after that his own.[4] This seems to be the rule to be applied in such cases. This would seem to have been the position according to the śāstras.

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1. Vide J.R.Gharpure, op.cit., p.792; Kātyā. 552-3, vide P.V.Kane, op.cit., pp.227-28; The Smṛticandrikā, vide J.R.Gharpure, op.cit., p.321; cf. Nār. q. at p.241, vide J.R.Gharpure, trans., The Smṛticandrikā, Vyavahāra kāṇḍa, pt. I, (Bombay, 1948), p.241.

2. "If he who contracted the debt should die, or become a religious ascetic, or remain abroad for twenty years, that debt shall be discharged by his sons or grandsons."
Viṣ.VI.27, vide J.Jolly, trans., op.cit.,pp.44-45.

3. Kātyā. 548-5o, vide P.V.Kane, op.cit., p.227.

4. Pitramevāgrato deyam paścādātmīyameva ca /
tayoḥ paitāmaham pūrvam deyametadṛṇam sadā //
Bṛ.q. in Parā.Mādha., vide V.S.Islampurkar, op.cit., p.264; The Vivādaratnākara, vide P.D.Vidyalankara, op.cit., p.47; Bṛ. XI.48, vide J.Jolly, trans., op.cit., p.328; P.V.Kane, H.Dh., vol. III, op.cit., p.445, n.748.

The Pious Obligation under Modern Hindu Law : The dharmaśāstra information on the Pious Obligation was not law in the modern Western sense.[1] On the other hand the dharmaśāstra theory insisted on a scheme whereby in litigation four sources of law should be consulted. The sources are described in the smṛti texts as the four "feet" of vyavahāra (vyavahāra here means "judicial administration")[2]. The four sources of law are, in order, dharma (righteousness), vyavahāra (cursus curiae), caritra (actual usage in the sense of custom), and rāja-śāsana (royal decree). Each subsequent source overruled previous source.

The Pious Obligation is an excellent example of the contingency that in the forum a proved custom or established course of decision will overrule the norm of righteousness according to the standard of conformity to the religious jurisprudence reached for the time being in that particular form. It is not possible to argue that the dhārmic rule was invariably enforced; nor can one argue that it was never enforced - still less that it was unenforceable.[3]

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1. J.D.M.Derrett, Essays in Classical and Modern Hindu Law, III, (Leiden, 1978), preface.

2. J.D.M.Derrett, R.L.S.I., cit. above, pp.148-156; cf.R.Lingat, The Classical Law of India, cit.above, part II, chap.2, p.176ff.
   Also see, J.D.M.Derrett, 'A New Treatise on the Nature and Sources of the Dharmaśāstra,' in Purāṇa, vol.X, No.1 (Varanasi, Jan.1968), 77, at pp.90-93; R.C.Hazra, 'Dharma - Its early meaning and scope' in Our Heritage. vol.VIII, (Cal., 1960), 7 at pp.29-32.

3. For, there is clear evidence showing that in pre-British period the son was held liable for his father's obligations during both the Hindu and Mohammedan administrations.
   For example, in Archaeological Survey, Mysore, Annual Report, 1911-12, at p.44, para.91 we come across an insciption (A.D. 1252) referring to a law-suit and its decision by the King. It states that Nāgaṇṇa and Sōvaṇṇa, not knowing their father's transaction, wanted to take possession of the property concerned whereupon the case went up to Nārasiṃha-Dēvarasa, who told them that they were in justice bound to carry out the wishes of their father and decided the case in favour of the other party. Thereupon Nāgaṇṇa and Sōvaṇṇa acknowledged the gift of the property made by their father Dēvaṇṇa who had purchased it from Bhaṇḍāri Adiyaṇṇa.
   The inscription - Epigraphica Carnatica, 15,Supplementary

(continued on the next page)

Since the British administration of justice, however, the doctrine of Pious Obligation has undergone considerable change, and therefore, in order to understand its proper function under

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continued from the last page)

Inscriptions, New Inscriptions from Belur Taluk, No.32o - is as follows:

Virōdhikṛtu-saṃvatsarada pu śudha 15 Ādivāraha svasti śrīmatu pratāpacakravartti Hoyisaṇa ...
vaṃṇṇanu Bhaṇḍāri Ādiyaṇṇana kayyalu tatkālōcita-krayava koṭṭu koṇḍa nivēśanavanu tamma ārāḍyata ....
neṟasi kalla naḍsi koṭṭaru adan aṟiyade ā-Dēvaṇṇa makkaḷu Nāgaṇṇa Sōvaṃṇaṃgaḷu Nārasiṃha-dēvarasara munde ī ....
vara makkaḷu parākivū nimma tande māḍi dharma-vidhiya āgadendare haṃgaḍu .. ṃdu pramā ....

Translation (by J.D.M.Derrett)

In the year Virodhakṛt, the fifteenth of the bright half of the month Puṣya, Sunday (A.D. 1252)*. Hail! (While) the mighty emperor Hoysaḷa (Someśvara (?) was ruling the earth) Devaṇṇa paid cash into the hands of Treasurer Ādiyaṇṇa and bought at the appropriate time a dwellinghouse and gave it to their respected ... and erected a stone.** The sons of Devaṇṇa, viz. Nāgaṇṇa and Sovaṇṇa, who had been unaware of this, went before King Nārasiṃha (to dispute) this ... those sons. "Take care! You are bound not to render void the dharma-disposition (the vidhi, or precept of or for dharma) which has been made by your father", he said: (therefore there is) an authority (?)..***

* Dharma-vidhi is the operative word. It can mean the injunction implied in the fahter's action, which the sons must respect, or the performance by the father of the injunction inherent in precepts of Dharmaśāstra: on the whole, the latter seems to be more probable.

(I am indebted to Prof.J.D.M.Derrett for the translation of the original and his valuable comments; and also to Dr.G.S. Gai, for supplying the copies of the original from India.)

Also, see J.D.M.Derrett, R.L.S.I., op.cit., pp.21o-11.

Examples of holding the son liable for his father's obligation during the later period, appear in later writings: see, V.K.Rajwade, ed., Marāṭhyāṃchyā Itihāsāchiṃ Sādhanē,vol.15, (Bombay, 1912), p.22ff; for further explanation see, G.Smith and J.D.M.Derrett, 'Hindu Judical Administration in Pre-British Times and its Lesson for Today'. J.A.O.S., vol.95, No.3 (1975) 417, at 421, f.n.24; M.V.Gujar, ed., Pavār Viśvāsarāo, Gharāṇyāchā Aitihāsic Kāgada-Saṃgṛha, 2nd edn., (Poona, 196o), pp.1-2. For the facts and decisions in these cases, see below p. 227, f.n.1 and Appendix II.

modern Hindu law, we must clarify its position very briefly.[1]

The process would seem to have begun almost as soon as the British undertook administration of justice in India. They "sought to find a limitation upon it which might be equitable and consonant with modern ideas of justice."[2] This is evident from their reluctance to extend the son's liability beyond the assets he received from his father.[3] The trend continued;[4] and that the liability under this doctrine is a liability of the joint estate was stated by the Privy Council in 1936.[5] Later

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1. For a succinct account of its present position, reference may be had to J.D.M.Derrett,'Indica Pietas', cit.above, p.5off, and to his C.M.P.L., op.cit., p.93ff.
   It may be noted here that in order to avoid fruitless repetition, I have relied mostly on the above authorities so far as this portion is concerned. However, I have added all upto-date authorities, and discussed latest developments concerning this doctrine.
   The doctrine of Antecedency is fully discussed in the chapter dealing with certain foreign concepts, see chapter V, in the part II below.

2. J.D.M.Derrett, 'Indica Pietas', op.cit., at p.5o,

3. In Aga Hajee v.Juggut, (1779) Mort. Montr.272, the Court was not prepared to hold the son liable for his father's debt beyond the assets he had received from his father. Cf.Colebrooke's remarks at the end of the decision in Timmarah v. Veneapah, (18o7); vide T.Strange, Hindu Law, II, 3rd edn., (Madras, 1859), 456-457. And also, W.Jones' note that "Without which (i.e., assets) the son and grandson are under a moral and religious, not a civil, obligation to pay the debt, if they can; but assets may be followed in the hands of any representative." Vide H.T.Colecrooke, Digest, I, cit. above, p.266.

4. In 1866, The Hindu Heirs Relief Act, Bombay Act VII of 1866, enacted inter alia that a son or grandson shall not be liable to be sued for the debts of his deceased ancestor merely by reason of his being such a son or grandson; the son, grandson or other heirs shall be liable only to the extent of the assets that come to his hands.
   The lead given by this enactment was followed by the Courts in other parts of India: see the Judgement (by 3-2) in Ponnappa v.Pappuvayyangar, (1881) I.L.R.4 Mad.1, at p.2; also see, Vencapaiya v.Visvesvaraiya, (1892) 15 Mys. L.R.196, at p.197; P.Venkanna v.Sreenivasa Deekshatulu, (1918) I.L.R.41 Mad.136, at p.142; also see, J.D.M.Derrett,'Indica Pietas', op.cit., p.56, f.n.48.

5. Sat Narain v.Rai Bahadur, (1936) L.R. 63 I.A. 384, at p.396.

the Supreme Court held that "The doctrine of Pious Obligation is not merely a religious doctrine but has passed into the realm of law. The doctrine is a necessary and logical corollary to the doctrine of the right of the son by birth to a share of the ancestral property and both these conceptions are correlated."[1] Presently, therefore, "The Pious Obligation is confined to the interests of the male issue in Mitākṣarā joint family property."[2] Thus, not only the śāstric nature of the doctrine but also its scope has changed almost beyond recognition.

In view of this development, the immunity given by the śāstras to the minor son (see above pp. 44-45), the grandson and great-grandson, as also the distinction made between the three degrees of descendants (see above pp. 43-44), was abandoned as of no value. Consequently, all the three degrees, provided they are members of the joint family when the debt was incurred, are equally and concurrently liable to the extent of their share in the Joint family property.[3]

Moreover, the conditions laid down by the śāstras in respect of the time when the son's liability arose (see above pp.44-45) were also modified. Once the existence of the father's personal, untainted,[4] pre-partition[5] debt is proved, the son

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1. Anthonyswamy v.M.R.Chinaswamy, A.I.R.1970, S.C.223, at p.227, c.1 This case concerned certain Christians customarily governed by Hindu law in this regard.
2. J.D.M.Derrett, 'Indica Pietas', op.cit., p.57. Cf. Vyankatesh v. Kusum, (1975) 77 Bom. L.R.671, at p.677. In this case, the Court refused to extend the doctrine to debts incurred by the father under the provisions of a secular statute (Tagai Loans Act), on the ground that such extention would discriminate between citizens on religious ground. Here the provisions of the Act would seem to conflict with the scope of this doctrine. However, looked at from the real nature of the Pious Obligation as obtained under modern Hindu law, i.e., it is attached to assets, and the religion plays hardly any part now, the question of discrimination would hardly arise.
3. J.D.M.Derrett, 'Indica Pietas', op.cit., pp.51-52, For the position in respect of surety debts, see below Appendix I.
4. For further explanation see above f.n.2 and 3, at p.19, also see, J.D.M. Derrett, 'Indica Pietas', op.cit., p.51. As regards personal debts of the father reference may be made to a recent article by B.Sundaramoorthy, 'A Note on Sankaranarayanan and Another v. The Official Receiver Tirunelveli and Others',at (1977) 2 M.L.J., J., p.9, c.2, which advocates that the P.O. applies to the father's debt due to new business, if not avyāvahārika.

(continued next page)

is held liable for it since its inception, irrespective of the debtor's being alive and quite capable of paying the debt out of his own means. But an obligation created by the father by way of an alienation of joint family property has been subjected to challenge on the ground of overstepping the father's power of alienation under Hindu law. Whenever such challenge was successful, the alienee was faced with the prospect of losing at least a part of his purchase; and unless he proved that the alienation was for an existing debt of binding nature, he could not recover it from the son's share. The situation, which was conducive to fraudulent actions against alienees of the father, led the Courts to develop the law so as to protect their interests on the basis of equity created by the acceptance of their money by the father. Such equity would bind the family property generally even in the hands of the son, and if the son's equity proved weaker, in view of his pious obligation, the alienee would succeed. However, this remedy was available when the Courts could impute intention to the father to sell in order to pay an existing debt. For, unless the debt existed, the Pious Obligation could not be invoked. The problem of the non-existence of debts in the strict sense of the term readily arose particularly where the transaction was a mortgage. Hence the formula developed that the father could sell ancestral property along with his son's share in order to pay his private, untainted, pre-partition, and antecedent debt.[1] Meanwhile, as soon as the existence of a binding debt is established, the liability under the doctrine of Pious Obligation is attached from its inception. The rule, as J.D.M.Derrett has shown, "has developed in order to protect alienees from fraud, and, indirectly, in order to establish the credit of Hindu fathers."[2] Since the liability is now confined to the share in the ancestral property which the

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f.n.5 continued) 'Pre-partion' because once the son is separated in interest from his father, he is ceased to be co-owner with the father and therefore he cannot be made liable for the father's subsequent incurred debt. Also see, Hardwarilal v. Dwarka Prasad, A.I.R. 1974 Raj. 1o1, at p.1o2. Regarding revived time-barred debts, see below pp.398-4o3.

1. J.D.M.Derrett, 'Indica Pietas', op.cit., pp.52-53. For fuller discussion of the doctrine of Antecedent debts, see below pp. 198-2o8.
2. Ibid., at p.57

son acquires by birth, it seems not inequitable that the father's just debts should become his son's liability as well immediately they are incurred. However, one wonders as to how far this obligation of the son could properly be called 'pious' in these circumstances.

Suffice it to say, however, for our present purpose, that the function of the Pious Obligation has been greatly modified, and accordingly, the son is not liable for more than the assets which he has acquired. His liability has been extended so as to be co-extensive with his birthright in the Mitākṣarā joint family property, if any. However, doubts in respect of applicability of this doctrine to debts incurred under a secular Statute have surfaced[1] (see above p.49, f.n.2), while on the other hand, by abolishing[2] the Mitākṣarā joint family system, the State of Kerala has set in motion a revolutionary trend which, if followed by other States in India, would lead to abolition of both the Mitākṣarā birthright and the Pious Obligation. Having regard to the uncertainty that surrounds the doctrine of the Pious Obligation (see Luhar v.Doshi, discussed below p.248 ff) and the aspirations of those who would prefer a unified civil code for the whole of the country, the trend would seem to be a welcome step in the right direction. How far the ordinary citizens in the rest of the country will respond to this kind of change will ultimately determine the success or otherwise of the enterprise. Meanwhile the Pious Obligation[3] has, as stated above, its function to perform.

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1. Also see, J.D.M.Derrett, C.M.H.L., cit. above, p.94.

2. The Kerala Joint Hindu Family System (Abolition) Act* 1975; Act 3o of 1976. Vide (1976) K.L.T., J., (Kerala Statutes), pp.97-98. For the background and comments reference may be had to J.D.M.Derrett, 'Law Reform in Kerala' at (1974) K.L.T., J., pp.2-6; P.Parameswaran Moothath, 'The Kerala Joint Hindu Family System (Abolition) Bill, 1973 - A Study; at (1973),K.L.T., J., pp.91-95; P.B.Menon, 'Some Stray Thoughts on the Kerala Joint Hindu Family System (Abolition) Act.1975, Act 3o of 1976' at (1977) K.L.T., J., pp.37-38.

   It may be noted that the special circumstances (which J.D.M.Derrett has mentioned at p.3) which exist in Kerala State do not exist in most of the other States in India, and it will be premature to predict their attitude in this matter. One would hope, however, that realistic counsels will prevail in the interest of all concerned.

   * Sec.5 reads: ..."After the commencement of this Act, no court shall, ... recognise any right to proceed against a son, ... for the recovery of any debt due from his father, ... on the ground of the pious obligation under the Hindu law, ... to discharge any such debt."

3. Udayan Chinubhai v. Commissioner of Income-Tax, (1978) 111 I.T.R. 584.

We have approached now the last, and, from our point of view, the most important of all the exceptions to this rule under the doctrine of the Pious Obligation. This exception absolves the son from the payment of his father's certain debts which are enumerated by the śāstrakāras (see f.n.3, p.19 above), though none of them has, (as we shall see in the following chapters), supplied us with any explanation. The most comprehensive of the lists available, that of Bṛhaspati, states,

> "Sons shall not be made to pay (a debt incurred by their father) for spirituous liquor, for losses at play, for idle gifts, for promises made under the influence of love or wrath, or for suretyship, nor the balance of a fine or toll (liquidated in part by their father)."[1]

Although Gautama[2] has used the term vaṇikśulka; and Vyāsa[3] (or Uśana), na vyāvahārikam in ṭheir respective lists; speaking generally this list gives us a broad idea as to which debts are not, in the view of the śāstras, covered by the Pious Obligation.

In a sense, all these debts (regarding vaṇikśulka see below p.70 ff) seem to be avyāvahārika or 'tainted'; (which we are going to investigate). Suffice it to say here that in the view of the śāstras, especially as interpreted in the Mitākṣarā school of Hindu law, the Pious Obligation is very much a feature of the joint Hindu family law. It is a corollary of the birthright.[4] The basic purpose of this doctrine appears to be to aid the departed father in fulfilling his primary obligation which, in fact, is a socio-religious obligation, the payment of all his debts, whether spiritual or secular; and that the benefits that might follow seem incidental. To say that it is for the spiritual benefit of

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1. Bṛ.XI.51, vide J.Jolly, op.cit., p.329; 'influence of love' in this context may be construed as 'influence of lust'; (for the further discussion see below p.151 ff.
   Saurākṣikam vṛthādānam kāmakrodhapratiśrutam /
   prātibhāvyam daṇḍaśulkaśeṣam putrānna dāpayet //
   Bṛ.q. in Dharmakośa, op.cit., p.708.
2. Prātibhāvyavaṇikśulka -- / Gaut.XII.38, Ibid., p.677.
3. -- yacca na vyāvahārikam / both Vyāsa and Uśana, Ibid., p.714.
4. J.D.M.Derrett, 'Indica pietas', op.cit., p.45.

the father is, perhaps, to tell a half-truth. The śāstras, as we have noticed above, excluded certain debts from this liability, apparently for some reason, but we have been told nothing about it. Whether the cause lies in the notion that in the Kali-age only the perpetrator is liable for his sins (see above p.4o), or whether it lies in the avyāvahārika nature of these debts (or something else), is the subject-matter of the remaining chapters of this study. We propose, therefore, to investigate and examine each and every debt, named in the above-mentioned lists of 'tainted debts', first, in view of the śāstras, the commentaries on them, and the digests, as understood by the modern scholars and jurists; and also, as they have been interpreted by the courts. We shall endeavour to trace realistically, as far as possible, the intended motive or motives behind these exceptions in view of both the dharmaśāstra and the arthaśāstra, and see what has become of them today, especially in the context of the present socio-psychological as well as socio-economic needs of the people. We might, then, be in the position to put forward some practical and desirable legal solutions, with a view to judicial or legislative reforms.

P A R T O N E

THE DHARMAŚĀSTRA AND ARTHAŚĀSTRA VIEW

CHAPTER II

FINES AND TOLLS

II.1 General

II.2 Our basic texts

II.3 The quantum of fines and tolls

II.4 The significance of the term vaṇik

II.5 The basis of their (Fines and Tolls) exclusion from the son's Pious Obligation

II.6 Summary

II.1 GENERAL

Debts which were incurred by Hindu fathers by way of unpaid fines and tolls were regarded, according to the śāstrakāras[1], as debts for the payment of which their sons were not liable. It is proposed here to investigate the position of these two kinds of debts, in the light of what has been expounded by the various śāstric text-writers and commentators on the subject.

To begin with the earliest period known, it may be said that any act which was then considered as against the accepted canons of good behaviour, either religious or moral, was supposed to result in creating an obligation as well as a sin on his part who committed the act.[2] It was probably a kind of moral obligation[3] which he was supposed to fulfil in order to relieve himself of the consequences of the sin. According to this theory, it appears that the person may be subjected to performing some religious and/ or secular duties to redress his misdeeds. For example, if a man committed a murder, during the Vedic age, he had to pay blood-money as an atonement for the murder[4] to the relatives of the murdered person.[5]

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1. Gautama, XII.41; Vasiṣṭha, XVI.31; Manu, VIII.159, Bṛhaspati XI.51; Kauṭilya, III.16,9; Yājñyavalkya, II.47; Vṛddha-Hārīta, IV.142; Vyāsa (according to the Vivāda-ratnākara) and Uśanas (according to the Mitākṣarā), see J.C.Ghose, The Principles of Hindu Law, 3rd edn., (Calcutta, 1917), p.546.
2. Medhātīthi on Manu, VIII.1; a similar explanation is advanced there. Vide G.Jha, trans., Manusmṛti, vol.IV, pt.I, (Cal.,1924), pp.1-2.
3. H.T.Colebrooke defines an obligation thus: 'An obligation is a moral tie, by which a person is held to do or to suffer some thing. In this wide sense, it is synonymous with duty.' Treatise on obligations and contracts, part I, (London, 1818), p.1; also, in a sense an obligation is equated with the meaning of the word ṛṇa. In the Taittirīyasaṁhitā (VI.3.10.5) where three debts have been referred to, the word ṛṇa stands for obligation.
4. J.Jolly, Hindu Law and Custom, cit.above, p.284: "... traces of a state of things have been preserved when the atonement for murder and slaughter ... when the blood-money used to be paid."
5. "... that in the Vedic age a blood-money ... was paid to the relations of a murdered person." Ibid.

Thus it seems that the payment was more in the nature of compensation than a fine in the modern sense, and the king did not keep it for himself.[1]

However, the position shows signs of change during the later period. Both fines and tolls are clearly mentioned in the literature of the period,[2] and the purpose behind the imposition of fines, it appears, was to punish the wrong-doer.[3] Moreover, it is evident from the existence of administrative machinery to collect fines, taxes, customs, etc. that by then the King had, almost certainly, become the recipient of the amount collected by his officers.[4] At the same time, it may

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1. "... Probably the King did not keep these fines for himself, but gave them to the family of the murdered person." Ibid.

2. N.K.Wagle,'Some aspects of Indian Society as depicted in the Pali Canon', Thesis No. 396 (London, 1962), pp.281-82, 316-317.

3. Ibid., pp.281-82.
While discussing the functions of Ñāti, Wagle refers to the following conversation wherein Roja Malla says to Ānanda, "I am not impressed by the Buddha, Dhamma or Saṃgha, but a rule was made .... that whosoever does not go to meet the Buddha will be fined five hundred (coins). It is due to fear of punishment from Ñātis (ñātinaṃ daṇḍabhayār) that I go."
Vinaya Piṭaka, I, p.247.

4. Ibid., pp.316-17.
A reference is made to government officials on p.316.
Therein it is said that "Kammika, gāmikas and rājabhaṭas are the next important (to the ministers etc.) group since they interfere directly by influencing the economic activities. Kammikas act as customs' officials. Thus a caravan from Rājagaha going south intends to evade the tax. Kammikas come to know of this plan and they infest the way, seize the caravan and confiscate it."
Vinaya Piṭaka, IV, p.131.

Also, on p.317, 'The tax-collecting centres of the king have been referred to as situated in a mountain pass or at a ford in a river, or at the gate of a gāma.'
Vinaya Piṭaka, III, p.52.

be pointed out here that this period witnessed a change also in connection with spiritual affairs of mankind and consequently the idea that by paying a fine one could achieve purification lost its importance, it seems.[1] However, it is submitted that this view, though realistic, is based merely on an inference, for the word used therein (see f.n.1) is 'wealth' and not 'fine'.

The dharmaśāstras have a different story to tell. According to them, a fine was not only one of the means of atonement[2], it was also an instrument in the hands of the king to punish those who committed crimes, or wronged other people[3] or the state.[4]

Moreover, a fine was undoubtedly considered by them to be

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1. Ibid., p.274. Here, while dealing with the value of gotta in spiritual affairs, it is said, "The mortals are purified by deeds, knowledge and dhamma, not by gotta or wealth."
   Dīgha Nīkayā, I, p.99.
   'Gotta' (Skt.gotra)means 'lineage' (family name).

2. Manu, VIII, 318. "Men who having committed crimes, have been punished by kings, became freed from guilt and go to heaven, ..."
   Vide G.Jha, trans., op.cit., vol.IV, pt.II, (Cal., 1926), p.349.

3. P.V.Kane discusses how and why the ruler and daṇḍa was created in his History of Dharmaśāstra, III, cit.above, p.22; and expresses his view that "the conception of daṇḍa is, therefore, this that the state's will and coercive power keep the individual and nation within the bounds of dharma, punish for breaches, and effect the good of the whole."
   Also, Medhātīthi on Manu, VII.I. 2; Vide G.Jha, op.cit., vol.III, pt. II, pp.274-75.

4. Kauṭilya, 5.2.15: "For one selling these (prohibited goods) without persmission, (the punishment shall be) the lowest fine for violence."
   Vide R.P. Kangle, trans., II, cit.above, p.344.

a legitimate source of livelihood for the king[1] and a weapon by which the king could protect his subjects from evil-doers and maintain law and order in the kingdom.[2] Thus, it appears that a 'fine' as one of the four methods of daṇḍa[3] - a word which comes from the root 'dam' which means to restrain or to deter,[4] and which also denotes punishment as well as fine[5], - came to be regarded as an instrument, in the hands of the king, to protect his subjects, which the king used primarily to restrain those who broke the law and to deter potential law-breakers.[6]

It may also be pointed out here that the use of a fine, in the sense of the king's livelihood, became dominant

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1. Medhātīthi on Manu, VIII, 318; ... "punishment in the form of fines becomes useful to the king." Vide G.Jha, op.cit., vol.IV, II, p.35o.
   Also, Medhā. on Manu, VIII.1, G.Jha, op.cit., vol.IV, pt.I, p.2. But it is submitted that Jha's translation seems to be wrong. He says, "Then again, in as much as for the king there is no other lawful means of livelihood except the fines imposed upon criminals, and the taxes and duties, any obstacles in the proper administration and collection of these leads the kingdom into trouble."
   Here Medhātīthi is explaining why vyavahāra is necessary: dhana-daṇḍasca rājñaḥ karaśulkādi vā tadanyadharmiṣṭa-jīvikā na bhavatīti vṛtti-parikṣayād api rājyāvasādaḥ./
   that is, 'The kingdom (administration) would be enfeebled if the king's income were reduced, for (if there were not legal administration) there would be no (i) fines, (ii) royal taxes and tolls, etc. (iii) other lawful means of livelihood apart from those first two (e.g., mines, treasure-trove, customary presents)'. For the text see V.N.Mandalika, ed., Mānava-dharma-śāstra, vol.II, cit. below, p.869, and compare G.Jha, ed., Manusmṛti, vol.II, cit.below, p.7o
2. Manu, VII.1.2, "The protection of all this shall be done according to law, by the Kṣattrīya who has received the Vedic training in due form." According to Medhātīthi, 'all this' in this verse means 'all the people who pay taxes as well as who are poor and helpless.' Vide G.Jha, op.cit., vol. III, pt.II, pp.274-275.
3. P.V.Kane, H.Dh., vol.III, cit.above, P.39o; Manu, VIII.129; Yājñ.I 367; Bṛhaspati (S.B.E.33, p.387, verse 5); and Vṛddha-Hārīta, VII.195 - all these speak of four methods of Daṇḍa.
4. Ibid., P.V.Kane, p.389; H.T.Colebrooke, Digest, I, cit.above, p.132; J.Jolly, op.cit., p.28o.
5. R.K.Ranade, (195o) 52 Bom. L.R., J., p.33, at p.35
6. P.V.Kane, op.cit., p.22; Manu, VII.1.2, vide G.Jha, op.cit., vol.III, pt. II, pp.274-275.

later[1], than the use of the term in its original sense.[2] That is to say, its primary purpose became to raise revenue for the king rather than the atonement of the criminal. One thing is quite clear, however, that basis of a fine has reference to some kind of illegal or immoral act on the part of the person fined (see below p.75 ff).

We may now proceed to study, in detail, the views of various śāstrakāras, particularly in respect of the nature of the liability which is incurred by way of unpaid fines and tolls by a Hindu father.

II.2 OUR BASIC TEXTS

Our basic texts, containing all the excepted debts are as follows:

According to Gautama, XII.41,

> Prātibhāvya vaṇikśulka madhya dhyūta daṇḍā na putrānadhyābhaveyuḥ /[3]
>
> "Money due by a surety, a commercial demand, a toll, the price of spirituous liquors, a loss at play, and a fine, shall not involve the sons of the debtor."[4]

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1. Dubois, Hindu manners, customs and ceremonies, (edited by H.K. Beauchamp), 3rd edn., (Oxford, 1906), p.657.
   Here, the author refers to criminal jurisprudence in India during the period ending 18th century and the beginning of the 19th century A.D., and states that "They (the rulers) thought it would be less cruel and more advantageous to the State to inflict very heavy fines for offences of this nature (adultery is meant here)."
2. J.Jolly, p.280, cit.above, f.n.1, cf. the beautiful ode to daṇḍa in Mahābhārata, 12.63. 28-29. According to these verses it appears that daṇḍa should be translated by 'internal administration' and not merely by 'punishment' which was its original meaning.
   According to the Mahābhārata, śāntiparva, 12.63.28-29, i.e., Majjet trayī daṇḍanītau hatāyāṃ ... sarve lokā rājadharmān-praviṣṭāḥ //
   vide S.K.Belvalkar, ed., The Mahābhārata, vol.13, pt.I, (Poona critical ed., 1961), p.295.
   In short, these two verses emphasize the importance of preserving the science of chastisement or punishment; for, if it disappears, the Vedas, the scripture, all duties, including kingly duties, etc. would disappear.
   For trans. see M.N.Dutt, The Mahābhārata, books 8-18, (Cal.,1901),p.93; P.C.Roy, trans., The Mahābhārata, vol.VI-VII,(Cal.,1926), p.147.
3. U.C.Pandey, ed., Gautamadharmasūtra, (Varanasi, 1966), p.127; V.Mitra, ed. Gautamadharmasūtra, (New Delhi, 1969), p.192; cf. P.V.Kane, H.Dh.,III, cit.above, p.446, f.n.752.
4. H.T.Colebrooke, trans., Digest, I, cit.above, p.305, verse 202.

However, the term 'vaṇikśulka' has been rendered by G.Bühler as "a commercial debt, a fee (due to the parents of the bride)."[1]

Vasiṣṭha, XVI.31 says,

> Prātibhāvya vṛthādānamākṣika saurikam ca yat / daṇḍaśulkāvaśiṣṭam ca na putro dātumarhati //[2]
>
> "A son need not pay money due by a surety, anything idly promised, money due for losses at play or for spirituous liquor, nor what remains unpaid for a fine or a toll."[3]

Manu, VIII.159 is identical:

> Prātibhāvyam vṛthādānam-ākṣikam-saurikaṃca yat / daṇḍaśulkāvaśeṣam ca na putro dātum arhati //[4]
>
> "But money due by a surety, or idly promised, or lost at play, or due for spirituous liquor, or what remains unpaid of a fine and a tax or duty, the son (of the party owing it) shall not be obliged to pay."[5]

The terms daṇḍa and śulka have been rendered by G.Jha[6] as 'fines' and'duties' respectively, while J.D.M.Derrett[7] has rendered the latter as 'toll'.

According to Yājñavalkya, II.47,

> Surā-kāma dyūta-kṛtam daṇḍa-śulkāvaśiṣṭakam / vṛthādānam tathaiveha putro dadyān na paitṛkam //[8]

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1. G.Bühler, trans., S.B.E.2, (Oxford, 1879), p.241; J.C.Ghose, op.cit., p.532.
2. J.C.Ghose, op.cit., p.534.
3. Ibid, also, G.Bühler, trans., S.B.E.14, (Oxford, 1882), p.82.
4. V.N.Mandalika, ed., Mānava-dharma-śāstra, vol.II, (Bombay, 1886), p.975; G.Jha, ed., Manusmṛti, vol.II, (Cal., 1939), p.149; J.C.Ghose, op.cit., p.530; K.V.R.Aiyangar, ed., The Kṛtyakalpataru, cit.above, p.315; J.D.M.Derrett, ed., Bhāruci's Commentary on Manusmṛti, vol.I, (Wiesbaden, 1975), p.115.
5. G.Bühler, trans., The Laws of Manu, S.B.E.25, (Oxford, 1886) p.282; J.C.Ghose, op.cit., p.531, is identical.
6. G.Jha, trans., Manusmṛti, vol.IV, pt.I, (Cal., 1924), p.201.
7. J.D.M.Derrett, trans., Bhāruci's Commentary on Manusmṛti, vol.II, (Wiesbaden, 1975), p.144.
8. S.S.Khedwal, ed., Yājñavalkya-smṛti, (Bombay, 1900), p.138; H.N.Apte, ed., Yājñavalkya-smṛti, A.S.S.46, (Poona, 1904), p.648; N.P.Parvatiya, ed., The Vyavahāra-Bālambhaṭṭi, (Benares, 1914), p.178; J.C.Ghose, op.cit., p.535.

"That which was contracted for the purposes of spirituous liquor, lust, or gambling, or which is due as the balance of an unpaid fine or toll, as also a gift without any consideration, the son should not pay (such) parental debt."[1]

According to H.T.Colebrooke[2] daṇḍaśulkāvaśiṣṭakam means 'what remains unpaid of a fine or toll'. However, J.C.Ghose[3] has translated the term as 'a fine, or what remains unpaid of a toll'. He seems to have treated daṇḍa separately, which, in view of its treatment by others, appears to be erroneous. Apparently, the term avaśiṣṭakam refers to both daṇḍa as well as śulka, and, therefore, the meaning would seem to be 'the balance of a fine or toll'.

Bṛhaspati, XI.51 lays down,

Saurākṣikam vṛthādānam kāmakrodhapratiśrutam /
prātibhāvyam daṇḍaśulkaśeṣam putrān na dāpayet //[4]

"Sons shall not be made to pay (a debt incurred by their father) for spirituous liquor, for losses at play, for idle gifts, for promises made under the influence of love or wrath, or for suretyship; nor the balance of a fine or toll (liquidated in part by their father)."[5]

However, according to H.T.Colebrooke it means,

"The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or of wrath; or sums for which he was a surety, except in the cases before mentioned, or a fine, or a toll, or the balance of either."[6]

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1. J.R.Gharpure, trans., Yājñavalkya-smṛti, vol.II(3), (Bom., 1938), p.786;
2. H.T.Colebrooke, trans., Digest, vol.I, op.cit., p.311, verse 20
3. J.C.Ghose, op.cit., p.535.
4. Ibid, at p.540; G.Jha, trans., The Vivādacintāmaṇi, (Baroda, 1942), p.29; according to the latter the verse is Bṛhaspati, X.118, so also, K.V.R.Aiyangar, ed., The Kṛtyakalpataru, cit.above, p.316.
5. J.Jolly, trans., S.B.E.33, (Oxford, 1889), p.329; J.C.Ghose, op.cit., p.540; Ghose's translation is identical to Jolly's except that it has missed, perhaps due to a printing mistake, the term ākṣikam, i.e., 'for losses at play'.
6. H.T.Colebrooke, trans., Digest, op.cit., p.305, verse 201.

The inclusion of the underlined phrase shows that this rendering goes beyond the literal sense of the verse, and has reference to other details on the subject (see Appendix I below). Also, the construction of the term daṇḍaśulkaśeṣam indicates a similar tendency on Colebrooks's part, i.e., here, he seems to have the views of Vyāsa or Uśanas in mind.

Nārada, I.1o states,

> Na putrarṇam pitā dadyāḍ dadyāt putras tu paitṛkam /
> kāmakrodha surā dyūtaprātibhāvya-kṛtam vinā // [1]
>
> "A father must not pay the debt of his son, but a son must pay a debt contracted by his father, excepting those debts which have been contracted from love, anger, for spirituous liquor, games or bailments."[2]

Here, 'lust' would seem to be appropriate meaning of the term kāma than 'love'. It may also be noted that Nārada seems to have omitted daṇḍa and śulka from his list of excepted debts.

Vṛddha-hārīta, IV.142 says,

> Surākāmadyūtakṛtam vṛthādānam tathaiva ca /
> daṇḍaśulkāvaśiṣṭam ca putro dadyān na paitṛkam // [3]
>
> "Debts incurred for spirituous liquor, lust, gambling, what is idly promised as gift, or what remains unpaid of a fine or a tax or duty: (these debts) of the father, the son should not pay."[4]

Here the translation of the word śulka as 'a tax' seems to be incorrect in view of its rendering by most others as 'a toll or duty'.

According to Vyāsa[5] or Uśanas,

> Daṇḍam vā daṇḍaśeṣam vā śulkam taccheṣam eva vā /
> na dātavyam tu putreṇa yac ca na vyāvahārikam // 6

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1. J.C.Ghose, op.cit., p.536; P.V.Kane, H.Dh., III, cit.above, p.446, f.n.752 where it is Nār.IV.1o; A.S.S.46, op.cit., p.648; the same verse seems to have been quoted in Sanatkumārasaṁhitā ed., by V.Krishnamacarya, Adyar Library Series, 95, (1969), p.3.
2. J.Jolly, trans., S.B.E.33, op.cit., p.45; J.C.Ghose, op.cit., p.538.
3. Ibid., at p.546.
4. Ibid.
5. Vyāsa's terms read daṇḍo vā daṇḍaśeṣo vā and the rest of the verse is same as Uśanas, see Vyāsa quoted in the Kṛtyakalpataru, op.cit., p.316. On the other hand, Aparārka on Yāj.II.47, quotes Uśanas in the terms attributed to Vyāsa, A.S.S.46, op.cit.,p.648.
6. J.C.Ghose, op.cit., p.545.

> "Neither a fine, nor a toll, nor the balance due for either, shall be necessarily paid by the son of the debtor; nor any debt for a cause repugnant to good morals."[1]

The term na vyāvahārikam has been construed by J.C.Ghose[2] as 'not proper', while J.R.Gharpure[3] has rendered it 'not legal or capable of being recovered by a suit', (for further discussion on this see below). Suffice it to say here that Colebrooke's construction has been generally accepted.

We find a similar rule even in the arthaśāstra under the heading of 'Non-payment of gifts'. Thus, according to Kauṭilya, III.16.2,

> Prātibhāvyam daṇḍaśulkaśeṣamākṣikam saurikam kāmadānam ca nākāmaḥ putro dāyādo vā riktha-haro dadyāt / [4]
>
> "The son or heir inheriting the property may not pay, if unwilling, obligations of suretyship, balance of a fine or dowry, a gambling debt, a debt for drinks and a gift of love."[5]

It may be pointed out that the term śulka may also mean 'a toll or duty', and the word kāma-dānam may appropriately be rendered 'a gift made under the influence of lust', (for further discussion see below).

It is clear from the above that in these texts fines and tolls appear together: daṇḍa-śulka. Only in one text - (Gaut. XII.41, see above p.6o), vaṇikśulka appear. Also it appears that the same subject-matter has received different treatment at the hands of these śāstrakāras. Thus of the nine of them referred to above, only one has mentioned both fine

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1. H.T.Colebrooke, trans., Digest, I, op.cit., p.3o7, verse 2o3.
2. J.C.Ghose, op.cit., p.546.
3. J.R.Gharpure, trans., Yājñavalkya-smṛti, vol.II(3), cit.above, p.786.
4. R.P.Kangle, ed., The Kauṭiliya Arthaśāstra, pt.I, op.cit., p.122; H.Chatterjee, op.cit., p.1o4, f.n.2.
5. R.P.Kangle, trans., The Kauṭiliya Arthaśāstra, pt.II, op.cit., p.281.

and toll; whereas six of them have referred only to the balance of a fine or a toll, and the remaining two have stated that both fines and tolls as well as the balance of them should not involve the sons. We are therefore faced with the problem of determining whether the śāstrakāras meant to exclude the entire amount of unpaid fine and toll of the father from the sons' liability, or only the balance of them, or both. Secondly, as stated above, of the nine śāstrakāras only Gautama, XII.41, speaks of vaṇikśulka. So the question arises: what is the significance of the term vaṇik in the context of the views of the rest of the śāstrakāras? Then again, we see that there is no difference or opinion among them as regards the meaning of the word daṇḍa, i.e., fine; but we have to find out why the son is exempted from its payment? On the other hand, the word śulka has been variously rendered, i.e., bride-price, dowry, tolls and duties etc.. Hence, presuming that these various renderings of the term are correct, we have to investigate them and their significance from the point of view of their exclusion from the son's liability under the doctrine of Pious Obligation. In the process, it may emerge that daṇḍa and śulka seem similar to a certain extent (see below p.114), and therefore they appear together.

Let us turn to our first problem: the controversy regarding the quantum of fines and tolls.

II.3 THE QUANTUM OF FINES AND TOLLS

According to Bhāruci on Manu, VIII.159/158,

> Śulkāvaśeṣam iti vacanāt kṛtsne śulke 'sti putrasya saṃbandhaḥ. daṇḍāvaśeṣasyāpy enam vidhim icchanti kecit.[1]

That is,

> "From the phrase 'remainder of a toll' we see that the son has a connection with the entire toll. Some would apply the same rule to the 'remainder of a fine'."[2]

Thus in his opinion it seems that the son is liable when an

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1. J.D.M.Derrett, ed., Bhāruci's Commentary on the Manusmṛti, vol.I, cit.above, p.115.

2. Ibid., trans., vol.II, p.144.

entire toll or fine is to be paid. However, this view was not shared by Medhātithi on Manu, VIII.159. He says,

> Daṇḍaśulkayoravaśeṣaḥ/ yatra pitrā daṇḍaṃśaḥ śulkāṃśaśca kaściddattaḥ paripūrṇau daṇḍaśulkau na dattau tādṛśasya pratiṣedhaḥ / yatkiṃcitpitrā dattam sa taddāpyate / ... tatra vikalpaḥ / mahatyaparādhe mahati ca dhane paitrike avaśeṣasya pratiṣedhaḥ / śulke apy evam / svalpe tu sarvasya /[1]
>
> "If the father has paid a part of the fine or a part of the duty - but did not pay the entire amounts, - then the balance cannot be realised from the son. That is he cannot be made to pay what the father did not pay. (and after citing Gaut. XII.41, see above, he continues) Thus then, there is an option. If the crime for which the fine had been inflicted was a serious one, or the property inherited from the father is a large one, then the balance only of the fine, as of the duties, shall be remitted; but if they have not been serious, then the whole shall be remitted."[2]

This translation is unsatisfactory. It may mean that if the father has paid a part of daṇḍa or śulka, dhārmic purpose is fulfilled and hence his son need not be called upon to pay the balance; or it may be that if the father's offence was serious, and his estate was also large (he should have paid it, and if it was not realised from him) then his son should not be asked to pay the balance; (and further) if the offence as also the fine were minor or small, the son should not be made to pay anything at all.

On the other hand, having regard to the views of these two commentators, it may be argued that originally (it seems) the sons were liable to pay any fine which was totally unpaid; but if payment had been made in part the father was discharged of 'sin' and the pious obligation of the son was not called into play. Later it was felt unnecessary to call upon them with reference to any fine. For the texts of Vyāsa and Uśanas (which might be later texts) seem to point towards this trend, (see above, p.63).

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1. G.Jha, ed., Manusmṛti, vol.II, cit.above, p.15o.

2. G.Jha, trans., Manusmṛti, vol.IV, pt.I, cit.above, p.2o3.

Moreover, Sarvajñanārāyaṇa on Manu, VIII.159[1] says that no emphasis is to be laid on 'remainder'. Both Kullūka[2] and Rāghavānanda[3] seem to agree. Similar views seem to have been taken by Vijñāneśvara[4] and Aparārka[5] after citing the text of Uśanas. Vijñāneśvara on Yāj.II.47, (see above, p.61), says that from the use of the word 'balance' in the text ... it should not be supposed that the entire amount is to be paid.[6] The Vīramitrodaya explains thus: "By the mention of a fine, comes to be included its balance; its repetition again, therefore, is intended to indicate that such should be made in the case of a very large fine; (even) a small balance, however, need not at all be paid. According to the Ratnākara it is deducible that(even) in the case of a small fine even the entirety need not be paid." [7]

Also Jagannātha quotes the Vivādaratnākara on Vyāsa. According to him,

> "Since the balance of fine is suggested by the general term 'fine', and is nevertheless repeated, the sense must be, that if the amercement be great, it must be paid, but not the small arrear of such a fine; but if the amercement be small, no part of it need be paid by the son."[8]

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1. Avaśeṣamityupalakṣaṇam / sarvamapyadattama deyameva / V.N.Mandalika, ed., cit.above, p.975.
2. Daṇḍam yaddeyam daṇḍam śulkam ghattādideyam tadavaśeṣam ca pitṛsaṃbandhinam pitari mṛte putrodātumnārhati / Ibid.
3. Daṇḍaśulkāvaśeṣam rājadaṇḍapaṇyastrī-ghattādisvīkṛta-śeṣam ca na putro dātumarhatītyanvayaḥ / Ibid.
4. Yatra daṇḍaśulkāvaśiṣṭakam iti avaśiṣṭagrahaṇātsarvam dātavyamiti na mantavyam / S.S.Khedwal, ed., Yājñavalkya-smṛti, cit.above, p.138.
5. Yacca daṇḍasya śulkasya ca deyamavaśiṣṭam ... putro na dadyāt / avaśiṣṭam-iti-avivakṣitam/ A.S.S.46, cit.above, p.648.
6. J.R.Gharpure, trans., Yājñavalkya-smṛti, op.cit., p.786.
7. Ibid., at p.788; H.T.Colebrooke, trans., Digest, I, cit.above, p.3o7.
8. Ibid. Colebrooke understands that 'fine', in this text signifies an inconsiderable fine; and 'toll', an inconsiderable toll.

On the contrary the Vivāda-ratnākara on Gautama, XII.41 states that "... a debt ... contracted for a toll or a fine need not be paid by the son of the debtor;"[1] though while explaining the same text of Gautama, Jagannātha argues, "... a fine originally small, or the balance of a large fine need not be paid by a son after the death of his father."[2] We have already referred to Medhātithi's similar views in the context of the same text (see above p.66). These views are apparently confusing and hence they do not appear to carry much weight. On the contrary they strongly suggest that by that period the exceptions were not taken very seriously. Perhaps the śāstric tendency during the period was to limit the scope of the doctrine of avyāvahārika. Jagannātha's attempted rationalisation is, it seems, also based on vikalpa - but in another sense; Medhātithi is more intelligent and intelligible. Perhaps Jagannātha's views reflect what was taking place in practice in his days (see below p.370 ff, on earlier cases on 'fines').

Moreover, in view of the above controversy, the determination of what may be deemed a large or a small fine may be disputed, for even a small amount may be a large one from a poor man's point of view, while the same amount may be nothing in the eyes of a wealthy man. Then again, if a small fine or a part of a large fine need not be paid by the son, why should he pay a large fine or toll? The commentators give no reason why this should be so. Further,

> "If a very small part of the greatest fine have been paid by the father, it is agreed on all hands (smṛtikāras) that his son shall not be compelled to discharge the remainder: but in another case, he must discharge the whole fine due by the father, amounting to somewhat less than the greatest fine; which forms a great disparity."[3]

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1. Ibid., at p.305.
2. Ibid., at p.306.
3. Ibid., at p.308.

The apparent confusion resulting from the various interpretations placed upon the original texts may be attributed to the commentators' efforts to bridge the gap between the theory ennunciated in the śāstric precepts, which were written long ago, and the actual practice prevailing in each of these commentators' time.

Perhaps, in order to overcome the uncertainty, Colebrooke's opinion on the subject may be accepted. According to him, the import of the expression used by Vyāsa (see above p.63), in fact, is this: "After the death of the father, a fine due by him need not be paid by his son; surely the balance of a fine need not be paid."[1] This may be applied to tolls also, so far as the determination of quantum is concerned.

In short, it appears that, generally speaking, earlier texts rescue the sons (if they wish) from the payment of residue of fines and tolls, whereas later texts, as if to explain matters but not necessarily so, insist that they be free from all fine or toll payments. As mentioned above (see p.66), it may well be that if some payment of fine or toll was made by the father the religious effect of the regulation was felt and the sons need not make it good. Later it was felt that the distinction was not viable, and therefore the sons were exempted from all payments of fines and tolls. (see Vyāsa and Uśanas above p.63).

In conclusion, therefore, on this issue of quantum of fines and tolls, it may be suggested that the verse of Vyasa (or Uśanas) may be accepted as stating the correct position of law on the subject; and, hence, "Neither a fine, nor a toll, nor the balance due for either, shall be necessarily paid by the son of the debtor."[2] This leads us to our next query: what is the significance of the term vaṇik in the context of the views of the rest of the śāstrakāras?

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1. Ibid.
2. Ibid., at p.307.

II.4 THE SIGNIFICANCE OF THE TERM VAṆIK

Haradatta on Gautama, XII.38, has (dissolving the compound into a dvandva) treated the term vaṇikśulka as two separate words: vaṇik and śulka. To him vaṇik means a 'commercial debt'; and śulka means 'bride price': Accordingly, he has explained the terms as follows:

> vaṇig-vāṇijyārthamupāttam dravyam tadapi na putrānabhyābhavati / yadā salābhamūlam dāsyāmīti paribhāṣya kasyacitsakāśāddravyam gṛhītvā vāṇijyāya deśāntaram gato mriyeta tadā tatputreṇa na tatprati kartavyamiti / tathā śulkam pratiśrutya vivāham kṛtvā mṛte tatputram na tacchulkamabhyābhavati / [1]

Bühler translates these explanations thus:

> "If a person has borrowed money from somebody on the condition that he is to repay the principal together with the gain thereon, and if he dies in a foreign country, while travelling in order to trade, then that money shall not be repaid by the son. (Likewise) if a person has promised a fee (to the parents of a woman) and dies after the wedding, then that fee does not involve his son, i.e., need not be paid by him." [2]

It would appear that here the father's borrowing might have been as an agent, not a capitalist in person. The capitalist takes the risk, and as such he could hardly be expected to agree to repay the debt along with his profit, i.e., salābhamūlam. If the father were an agent Haradatta's explanation concerning the son's exemption from the payment of such debts can be understood; but if he were a trader in his own right, then it is difficult to understand why such debts should not be paid by the son. Perhaps the borrowing contemplated by Haradatta was a high risk debt, or a debt incurred in śāstrically

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1. H.N.Apte, ed., Gautamadharmasūtra (with the Mitākṣarā of Haradatta), A.S.S.61, (Poona, 1910), p.98.

2. G.Bühler, trans., S.B.E., vol.II, cited above, p.244, (or according to other edn. p.241), f.n.41., Bühler notes here that "the word śulka is, however, ambiguous and may also mean 'a tax or toll'.

reprobated trade[1] (see below pp.72-73).

As regards the term vaṇik, Maskari's comments[2] on Gautama XII.38 appear to be similar to that of Haradatta. However, according to him, śulka is 'bride price' paid in the āsura[3] form of marriage. Vācaspati Miśra[4] renders vaṇik as 'commercial debt' and śulka as '(bridal) fee'. His explanation of vaṇik, i.e., "'commercial debt' stands for those goods that have become due from the father on account of commercial transactions,"[5] does not throw any light on the kind of commercial transactions he had in mind.

On the other hand, Medhātīthi who has referred to Gautama XII.41 while interpreting the term śulka in Manu, VIII.159, seems to have taken vaṇikśulka as one word (tatpuruṣa compound). Thus, Medhātīthi[6] on Manu VIII.159, interprets vaṇikśulka as 'trade dutries'. Colebrooke[7] says vaṇikśulka is 'a commercial demand or a toll; while to J.C.Ghose[8] it means'a commercial tax or toll'. He suggests that the word 'debt' in Bühler's rendering (see above p.63) is wrong. It should be 'toll' and 'a fee due to the parents etc.' should be omitted, for śulka here means tax or toll; and thus he agrees with Medhātīthi.

From the above discussion, it is clear that the authorities are equally divided. If the renderings of Haradatta, Maskari and Vācaspati Miśra are accepted, i.e., that vaṇik means 'commercial debt', it appears that they do not offer any convincing explanation why commercial debts of the father should be excluded from the son's pious obligation. However,

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1. I am obliged to Prof. J.D.M.Derrett for this suggestion.
2. vaṇigvāṇijyanimittam cetyarthaḥ / yathā mūlyam dadāmīti paribhāṣya kasyacitsakāśe dravyam gṛhītvā vāṇijyakaraṇārtham deśāntaram gatvā mrīyet putreṇa tadaprāptam ca bhavati tatastadṛṇam putrasyopari na bhavatītyabhiprāyaḥ / See V.Mitra, ed., Gautama-dharma-sūtra, with Maskari's Commentary, cit.above, p.192.
3. śulkam āsurādivivāhe śulkam .... na bhavatīti / Ibid.
4. G.Jha, trans., The Vivāda-Cintāmaṇi, (Baroda,1942), p.28.
5. Ibid., pp.28-29.
6. G.Jha, trans., vol. IV, pt.I, cit.above, p.2o3; also see ab., p.66,f.n.2.
7. H.T.Colebrooke, trans., cit.above, p.3o5, verse CCII.
8. J.C.Ghose, cit.above, p.532; also see H.Chatterjee, cit.above, p.1o4

J.D.Mayne says that

> "When Gautama says that a father's commercial debt need not be repaid by the son, he is certainly not referring to the debts incurred in the usual course of carrying on a business or trade but evidently to sums borrowed for speculative and hazardous ventures, involving something like gambling."[1]

Although we have no express authority prohibiting gambling, except Manu[2] IX.221-228, in view of the concern shown by most of the śāstrakāras (see below p. 121 ff), Mayne's explanation seems credible. Mayne seems to convey that speculative or hazardous ventures on the part of a father of the joint Hindu family might be considered avyāvahārika, and hence such debts might not be binding on the son.

The śāstras were concerned with preservation of dharma, and therefore they dispised gambling, drinking of liquors etc. for obvious reasons; namely, their adverse effects on peoples' lives, materially[3] as well as spiritually (see below p.121 ff). Probably realising that complete prohibition of such vices would be unrealistic, they laid down, it seems, certain selective restrictions.[4] This clearly shows that they wished to prohibit rather than encourage anything that would promote such vices. Hence, in their opinion, trading in liquors or running gambling casinos, for example, could hardly be a righteous way of earning one's living. Under the circumstances, therefore, if the father were to incur debts in such śāstrically reprobated trades like these, the debts might be viewed as avyāvahārika. Looked at from this point of view, the theory that when Haradatta

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1. J.D.Mayne, Treatise on Hindu Law and Usage, 11th edn., cit. above, p.399.
2. "Dyūta and samāhvaya should be driven out of the state by the king. These two faults of kings are the means for destruction of kingdoms." etc.. See N.C.Sen-Gupta, Evolution of Ancient Indian Law, cit., above, P.282 ff.
3. Where liquor is sold on credit misery and degradation results: L.Carroll, 'The Temperance Movement in India: Politics and Social Reforms,' at Modern Asian Studies, 1o/3 (1976), 417, at p.438.
4. Thus, we find that Brāhmins were completely prohibited from drinking while selective prohibition was laid down for others. See G.Jah's translation of Kumārila Bhatta's Tantravārttika, vol.I, (Cal., 1924), pp.192-2oo; J.Jolly's Hindu Law and Custom, op.cit., p.251; J.D.M.Derrett, C.M.H.L., cit.above, p.1o3.
   For restrictions on gambling see N.C.Sen-Gupta, op.cit., pp.281-285.

Maskari and Vācaspati Miśra construed vaṇik as 'commercial debts', śāstrically reprobated debts might have been meant, would seem to make sense. However, no one seems to have ever thought of this before.

On the other hand, Medhātīthi and others (see above p.71) treat vaṇikśulka as one word, meaning thereby trade-duties. Also, it should be remembered that like all other śāstrakāras, Gautama has used this word in the same context, i.e., while laying down the exceptions to the son's liability to pay his father's debts. Now, since the meaning attached to the word śulka in all these verses by various commentators is, almost unanimously, either a toll or duty, it appears rather strange to attribute a completey different meaning to Gautama's use of the same word. On the contrary, it may be suggested that Gautama, in an attempt to specify the correct import of the word śulka in this context, added the word vaṇik as an adjective thus making one word (tatpuruṣa compound) vaṇikśulka. In this sense it may further be suggested that in comparison with other śāstrakāras, Gautama has given more definite meaning to the word śulka in his verse than theirs, removing the ambiguity as to whether it should be considered as a toll or bride price.

And, should this rendering be accepted (that he meant a toll by śulka), it is a significant guide for interpreting the same word used by others, in this particular context, as a toll and not as a bride price; (for further details of these renderings of śulka, see below pp.83-144). In this connection we may mention that leading Sanskrit-English dictionaries give, among various others, the meaning of the word śulka as "A toll, tax, custom, duty; particularly levied at ferries, passes, roads etc. (Manu, VIII.159; Yājñ., II.47; Gaut., XII.41);"[1] and "Nuptial gift ..... dower, dowry,

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1. V.S.Apte, Sanskrit-English Dictionary, (Poona, 1959 edn.), p.1562; also see D.C.Sircar, Indian Epigraphical Glossary, (Delhi, Varanasi, Patna, 1966), p.423; G.S.Dikshit, Local Self-Governemnt in Mediaeval Karnataka, (Dharwar, 1964), p.171.

Marriage settlement etc. (Manu, 3.51;8.2o4;9.93,98; Viṣṇu, XVIII.18; Gaut., XXVIII.25; Raghuvaṃśa, 11.38)."[1] It may be noted that the authorities cited by these dictionaries seem to strengthen our view (also see J.C.Ghose above p.71). Moreover, having regard to the following view of Gautama, X.49[2] that "The additional (occupations) of a vaiśya are, agriculture, trade, tending cattle, and lending money at interest;" and in view of the fact that no other śāstrakāra has laid down a rule making a commercial debt, incurred in the usual course of carrying on business or trade, a part of these exceptions, it appears highly speculative to impute the intention to Gautama that, by vaṇikśulka, he means to exclude this kind of debt of a Hindu father from his son's liability to pay. Hence it is more likely that he meant by it a commercial toll or duty which a trader is supposed to pay (see below p.97 ff). In view of the above, therefore, it appears safer to conclude that the word vaṇikśulka in Gaut., XII.41, not only means a trader's toll or duty, but also, by implication, the meaning of the word śulka which is used by others in this context, may be regarded as a toll or duty, and not as a bride price or dowry.

II.5 THE BASIS OF THEIR (FINES AND TOLLS ETC.) EXCLUSION FROM THE SON'S PIOUS OBLIGATION

We may now turn to our next question: why were these debts of the father, i.e., fines and tolls, excluded from his son's liability under the doctrine of Pious Obligation? As we have noted above (see p.64), these debts appear together in the writings of the śāstrakāras, and therefore one suspects some analogy between the two (see below p.114). However, in view of their apparent basis, one also detects that the natrue of the liability arising out of non-payment of daṇḍa and śulka could hardly be the same. For it is like suggesting that the

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1. M.Monier-Williams, Sanskrit-English Dictionary, (Oxford, 1899) p.1o84.
2. R.K.Ranade, cit. above, p.37. Also see G. Bühler, trans., cit.above, p. 229.

liability to pay for breaking some traffic rules, for example, and that which one is expected to pay as the user of roads, is the same, which it is not. We may explain this by Kaut. 2.21.16, which says "And for goods that have passed beyond the foot of the flag without the duty being paid, the fine is eight times the duty."[1] It is apparent that the liability to pay the duty and the fine here is obviously based on different grounds.

Apparently the basis of the fine has reference to some kind of illegal or immortal act on the part of the person fined. But we cannot say that the same applies to toll from its inception. Moreover, we have been told that "Two prerogatives are attached to the royal function: the right to tax and the right to punish."[2] Now, in this context, too, these two belong to different royal prerogatives: the toll to the first and the fine to the latter. In view of this, therefore, we may treat them separately for our present purpose.

DAṆḌA (Fines)

The śāstrakāras say that the son is not liable to pay his father's debts due to fines (see above pp.6o-64), and their commentators seem to agree with them (see above pp.65-69) but none of them tells us why. We have, therefore, detective work on our hands. Although not directly on the point in question, there is ample information available in respect of the concept of daṇḍa which might throw some light on the nature and purpose

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1. R.P.Kangle, trans., cit. above, p.164;
   dhavajamūlamatikrāntānām cākṛtaśulkānām śulkādaṣṭaguṇo daṇḍaḥ /
   Kaut., 2.21.16; R.P.Kangle, ed., cit.above, pt.I, p.73.
   Also we come across similar instances, e.g., Medhā. on Manu, VIII. 4oo, vide G.Jha, trans., vol.IV,II, p.421; Nārada, III.13, vide S.B.E.33, p.126; and Viṣṇu, III.31, vide S.B.E.7, p.16, Mitā. on Yājñ., II, 262, vide J.R.Gharpure, trans., p.378.
   It is clear that the liability to pay the 'duty' and the 'fine' referred to in the above quotation is obviously based on different grounds. For further discussion of these see below p. 97, ff.

2. R.Lingat, cit. above, p.213.

of 'fines', with the help of which we might be able to answer this question.

According to K.V.R. Aiyangar,

> "Dharmaśāstra, like religion, dealt with the whole life, not with only a part of it. No one was outside its jurisdiction: the individual, the family, the corporations, and the king were all under it. It upheld the ideal of an indissoluble union between state and society, and king and subject. The welfare of the king was held to be rooted in the well-being of the people. Political union was sanctified by religious sanction. The King and Danda, the Spirit of Punishment (the power of santion) were both of divine creation."[1]

Apparently, the concept of danda is viewed here in its wider sense. P.V.Kane explains the term danda in the words of Gautama, XI.28, thus:

> "That the word danda is derived by the wise from the root 'dam' (to control), that he (the king) should control by means of danda those who observe no restraint; and (XI.31) that the instructions of the teacher and the power of punishment (wielded by the king) guard those who violate the rules of varnas and āśramas."[2]

And, after citing a number of śāstric - both the dharmaśāstra and arthaśāstra - authorities[3] he states that "The conception of danda is therefore this that the state's will and coercive power keep the individual and nation within the bounds of dharma, punish for breaches and effect the good of the whole."[4] On the other hand, while giving more realistic assessment of the concept, N.C.Sen-Gupta says,

> "The judicial authority of the king, as we find it in the earliest laws, is not founded on any fiction of his divine personality but upon positive law and had its ultimate historical basis in his function as the military chief. As such he would naturally concentrate in himself in a growing measure the power to coerce people to obedience. The law accordingly looks on him as a person whose duty it was to compel each person to adhere to the law of the varna to which he belongs. He is looked upon as the upholder of social

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1. Rājadharma, cit.above, p.34.
2. P.V.Kane, H.Dh., vol.III, cit.above, p.21.
3. Ibid., pp.21-22.
4. Ibid., p.22.

> and moral order, though, characteristically for India, in conjunction with the learned Brāhmaṇa. For the purpose of maintaining Dharma he is endowed with the power of daṇḍa or awarding punishment. The association of Daṇḍa (Punishment) with the king meets us at the very threshold of early law and is to be found also in the Brāhmaṇās. Daṇḍa is looked upon as the weapon to enforce obedience to Dharma, and, in a somewhat later conceit, is described as Dharma himself created in that shape by Brāhmaṇa. Daṇḍanīti or the laws about punishment is, from very early times conceived as a most essential part of the education of a King. But daṇḍa is to be applied according to established canons of dharma."[1]

One feels inclined to agree with this assessment because of its realistic approach. However, it is clear from all these authorities that the purpose of the concept of daṇḍa was undoubtedly to uphold and maintain dharma, i.e., righteousness as envisaged in the śāstras. Apparently, in its wider sense daṇḍa represents punishment or chastisement in general, and therefore includes all means of punishment. Obviously, daṇḍa in the sense of 'fine' is one of such means and has reference to some 'unrighteous act' on the part of the person fined. To be more precise, 'unrighteous act' may be anti-social, immoral or illegal in the sense of criminal or tortious or avyāvahārika (see below pp.161-176).

On the other hand, the śāstras have put forward the theory that purification of the criminal or wrong-doer can be achieved by way of chastisement or punishment. Thus, for example, Manu, VIII.318 declares that "Men who, having committed crimes, have been punished by Kings, become freed from guilt and go to heaven, just like well-behaved good men."[2] Medhātīthi has explained this verse at length.[3] If we paraphrase his commentary it amounts to this: punishment by the King purifies the punished offenders, i.e., their sin is set aside. Afterwards, by virtue of their meritorious acts, they are entitled to enter heaven.

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1. N.C.Sen-Gupta, cit. above, pp.38-39.
2. G.Jha, trans., Manusmṛti, vol. IV, pt. II, cit.above, p.349.
   Rājabhiḥ Kṛtadaṇḍāstu Kṛtvā pāpāni mānavāḥ /
   nirmalāḥ swargamāyānti santaḥ sukṛtinoyathā //
   Manu, VIII.318, V.N.Mandalika, ed., vol.II, cit.above, p.1062.
3. G.Jha, trans., op.cit., pp.349-351.

In his view, punishment serves a dual purpose - protection of the people and purification of the offenders. Punishment in the form of fines becomes useful to the king, being one of the means of his livelihood; and at the same time it causes some suffering to the person fined. But he suggests that punishment in the context of this verse means corporal punishment and holds that only by corporal punishment do criminals become absolved from guilt, not if they are only fined. In his words,

> "From all this it follows that the corporeal punishment, while tending to 'protection' (of the people), has to be regarded as serving the purpose of purifying the person punished. It is for this reason that there are rules laid down regarding the cutting off of limbs and other forms of corporeal punishment. All this produces an invisible effect in the persons punished, and at the same time serves the purposes of the king (in the form of protection). Thus it is established that the criminals become absolved from guilt only when there is corporeal punishment, and not when they are only fined."[1]

Whether Medhātīthi's assessment of the effects on the offender of corporal punishment and fines etc. is correct or not is difficult to tell; but, as stated, his view clearly discounts any possibility of absolving the offender of his guilt or sin by means of fines.[2]

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1. Ibid., p.351. Here, it may be noted that Jha's text (p.2o6) reads in part:
   ataśca kāraṇādi chedane niyamaḥ/hastyādividhiśca daṇḍyeṣva evādṛṣṭam ādhāsyati na rājārtho bhaviṣyati/
   but in Mandalika's text, (cit. above, p. 1o63), there is no na; it reads,
   ataśca ..... ādhāsyati rājārtho bhaviṣyati.
   However, Jha has followed Mandalika's edition in his translation.
   cf. Bhāruci on Manu, VIII. 318/317; he treats punishment in this context as penance appropriate to a theft. Fines are not mentioned, but he agrees that it serves both parties involved; see J.D.M.Derrett, trans., cit. above, pp.186-187.

2. Cf. Jagannātha, who quotes Manu as saying, "By open confession, by repentance, by devotion and by reading the scriptures, a sinner may be released from his guilt; or by alms-giving, by dominion over senses, or by a fine to the King (for the word dama admits both senses)." See H.T.Colebrooke, trans., cit.above, p.312, verse 2o6. Here Jagannātha seems to refer to Manu, XI.227, which reads,
   Khyāpanenānutāpena tapasā-adhyayanena ca/pāpakṛnmucyate pāpāttathā dānena cāpadi//
   which does not contain the term dama. Perhaps, he has taken it for the word dana i.e., gifts or almsgiving. If so, his reference to fine here seems to be his own view or a mistake. For the text, see Mandalika's edn., vol.II, p.1457, and also see G.Jha, trans., vol.V, p.528 for trans.

The śāstras have provided a long list of various means by which the offender may expiate guilt. Whether or not any of these means do expiate guilt, is beyond the scope of this study. But if what the sages have said[1] is considered to be true, then it seems that a fine alone lacks the expiatory function. Why, then, have the śāstrakāras included fines in the list? Probably because it is expected either to meet an exceptional case wherein the criminal is unable to perform any of the other rites for expiation of guilt, or its function may simply be considered as a material and not a spiritual one.

Before our inquiry into what happened in practice, we may briefly mention here that a general survey[2] of the śāstric provisions in respect of punishment for injury to person or property clearly shows that the provisions for compensation, fines, etc. appear in the same rules (see below). We must therefore be careful in our treatment of these provisions not to confuse the nature and purpose of the father's debts due to payment of compensation with that of fines.

Thus, for example, according to Manu, VIII. 287, "In the case of injury to limbs , ..., the man should be made to pay the expenses of recovery, or the whole amount as 'fine'."[3] That is, says Medhātithi, "If the man hurt does not accept all this, then the whole amount is to be totalled up and paid to the king as 'fine'."[4] Further, Manu, VIII.288 says, "When a man either intentionally or unintentionally, damages the goods of another, he shall give satisfaction to him and pay to the King a fine equal to it."[5] That is, "value must be paid to the owner's satisfaction and equal fine to the king."[6]

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1. "All authors (śāstrakāras) have directed penance, not the payment of amercement, to expiate guilt ...". Ibid.
2. For a concise exposition of the provisions on the subject by various śāstrakāras, reference may be made to N.C.Sen-Gupta, cit.above, chapter XII, p.286 ff.; Dandaviveka, cit.below , H.Dh., vol.III, cit.above, pp.167-168; J.D.M.Derrett, R.L.S.I., cit.above, pp.213-214.
3. G.Jha, trans., vol.IV, pt.II, cit.above, p.323.
4. Ibid., at p.324. *
5. Ibid.
6. N.C.Sen-Gupta, op.cit., p.296.

* 'accept' so Derrett translates Bhāruci (see his vol.II, p.176) on the same verse (VIII.286[287]). But 'receive' is the meaning needed.

Thus it is clear that the payment of compensation was meant for and generally paid to the victim of the crime, while the payment of fine was imposed in order to punish the offender and was due to the king. In view of this, though both the payments arise out of the same act, their purpose and nature are hardly the same. Compensation is equitable, but the fines are of a purely punitive nature. Because of this, it seems that the śāstras have expressly excluded the payment of fines from the son's liability to pay his father's debts. On the contrary, no such prohibition is laid down by the śāstras in respect of the father's debts due to compensation or reimbursement. Reimbursement may be part of the judicial order and yet distinct from daṇḍa.

In spite of the śāstric injunction, what happened in practice is not very clear, though it would appear from the following that the sons were in fact made to pay even the fines of their father. We have already stated above (see p.68) in connection with the commentators' different views on the subject that probably by that period the exceptions were not taken seriously. That the fines formed a part of the king's revenue is clear from an inscription[1] of about 1055 A.D.. According to another inscription[2] dated c.1131 A.D. it seems that, in practice, the son was made to pay his father's fines. However, the inscription is not very clear on this point; for it refers to the father, his son and his junior uncle who were made to pay both compensation and fine. It might be that all of them were responsible for the murder concerned. Two

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1. Epigraphia Indica, vol.XIII, p.175. The object of the inscription is to record a donation by the king to the god Kadambeśvara. The grant included certain estate as well as the right to all taxes within the specified area. In this context, the King's revenue from fines' is listed. In effect, the temple was granted the right to collect the king's revenue from fines imposed upon criminals in that area.
2. Epigraphia Carnatica, vol.VIII, pt. II, Sorab Taluq, inscription No.80, at p.13 in the section containing translations in English. Here, the son and others were made to give "100 gadyāṇa, and paid the fine of 50 ga for killing his son," i.e., somebody else's son. '100 gadyāṇa' seems to be compensation paid probably to the murdered person's relations and '50 ga' paid as fine to the king.

cases[1] decided by the Orthodox Hindu Court in the seventeenth century seem to prove that both compensation and fine arising out of the father's criminal act were payable by the son; however, it may be pointed out here that these cases were probably decided during Mohammedan rule.

On the other hand, ignoring the actual practice for the sake of argument, if we suppose, as the śāstras say, that the son was not liable to pay his father's debt due to fines, then what about the king's income from this source? Should the son be held liable to pay fines of his father merely on this ground?

Perhaps not; because that particular source (the fines) of the king's livelihood would seem to be incidental, and also it does not appear to be very dependable, as in the first place it could be expected only if a crime is committed and then proved in the court of law. True, to achieve proper fulfilment of his state responsibilities, the king must have a regular and sufficient source of income; but this is why he has the prerogative to tax his subjects. He might therefore be expected to assure himself of his income either by increasing the existing taxes or by imposing new taxes on his subjects. So, on this ground alone, it would not be justifiable to hold the son liable. Moreover, we know from inscriptional and other sources that mediaeval kings used to confiscate the Property of whole families and vicarious punishment was certainly known.[2]

In view of the foregoing, it may be said that the only viable theory in support of the śāstric injunction appears to be this: criminal liability was firmly attached to the

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1. Mahajaras in Jagadale's case, and a case found in Pavār Family's historical papers; for facts and other details see below, p.227, n.1 ; and Appendix II.

2. J.D.M.Derrett, R.L.S.I., cit. above, pp.215-16.

individual who committed the crime.[1] Accordingly, even the idea of an expiation by way of the payment of a fine, it seems, was dependent on the condition that the criminal or the wrong-doer must himself suffer the punishment. For it has been said that "the results of good and bad acts always accrue to the man that does them."[2] This might be the basic reason for excepting the payment of his father's fine from the son's liability under the doctrine of Pious Obligation.

Before concluding this section, however, it may be observed that when Medhātīthi advocates the payment of fines by the son (see above p.66), he might be referring to the payment of compensation arising out of a tortious act on the

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1. Medhā, on Manu X.91, vide G.Jha, trans., vol. V, pp.315-16; also see Medhā. on Manu IV.173, where he says: "it is not right that the consequences of acts done by one person should be described as falling on others. As a matter of fact, all Vedic acts bring their fruits to the person who performs them."
   Vide G.Jha, vol. II, pt.II, cit.above, p.437.
   Also see, Tra. Arch. Series, vol.III, pt. II, pp.191-196. Here the inscription No.49 (on p.196) states this: - "Those who transgress .... shall individually* be bound to pay a fine ... " (Dated: A.D. Middle of 13th Century.)
   *It is explained in the note that the word "Mey" whose variant is "Vey", means 'body, person or individual'; and hence the term (veyvērṟuvagai) means 'individually or separately'.

   Also see A.Avalon, The Great Liberation, (i.e. Mahanirvāṇa Tantra), cit. above, chapter XII.13, p.363, whereon it is said that "As men go to hell by reason of their own sins, so they are bound by their individually incurred debts, and others are not."

   However, it may be noted here that this authority has been described as "a well-intentioned fraud" .... see J.D.M.Derrett,'A Judicial Fabrication of Early British India' in Z.V.R. (1968), pp.137-181, on p.138.

2. Medhā. on Manu, X.91, vide G.Jha, trans., vol. V, pp.315-16.

part of the father, because on the one hand he refers to the seriousness of damage and on the other he refers to the large property inherited from the father. Whatever it may be, in view of his reference to Gautama, XII.41 (see above p.66), it appears unlikely that he meant fines per se.

Thus, from the above discussion it appears that, according to the śāstras, punishment by imposition of a fine applies to the person fined only, and not to anybody else; and hence it may be concluded that according to the śāstras the liability is not transferable. This, therefore, may be the reason to absolve the son from his liability to pay his father's debt due to fines.

ŚULKA: Bride-price, Dower or Tolls

The word śulka is used to denote various apparently unconnected things. According to leading Sanskrit-English dictionaries[1], it means "Price, value, purchase money; the prize of a contest; toll, tax, duty, customs (esp. money levied at ferries, passes and roads); nuptial gift (originally a price given to parents for purchase of a bride, but in later times bestowed on the wife as her own property together with the profits of the household labour, domestic utensils, ornaments etc.), dower, dowry, marriage settlement; wages of prostitution ... etc." Besides, there are various other meanings of this word when it is used as a compound with other words. However, the compilers of these dictionaries have, while explaining these meanings of the word śulka, referred to various works of authority[2] which enable us to understand its proper meaning.

It is very important, however, especially in the context of the list of debts not exigible from sons, that one should

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1. M.Monier-Williams, Sanskrit-English Dictionary, cit.above, p. 1084; V.S.Apte, Sanskrit-English Dictionary, cit.above, p.1562.

2. To explain when śulka means 'toll, tax, duty', V.S.Apte ibid., refers, for example, to Manu, VIII.159; Yājñ., II.47, but when it means 'purchase-price (of a girl) etc.', the reference is made to Manu, III.51; Raghuvaṁśa, 11.38, etc.

understand, from the legal and moral points of view, what exactly is the meaning of the word in a particular context. For example, a debt incurred due to non-payment of the price of any essential goods such as food cannot, in a legal or moral sense, be the same as that for liquor or for a prostitute in a society hostile to indulgence in those practices. It follows, therefore, that to determine the nature of the liability to pay a debt in respect of śulka, we have to make inquiry into the contexts in which the word is used, and as a result of the same, to determine what is its exact import from the point of view of the śāstric authorities.

ŚULKA AS BRIDE-PRICE: It will be appreciated that the ancient Indian, like the ancient Jewish and Muslim cultures, knew marriage by purchase and that, as in modern Africa, a certain selfconsciousness arose as to whether the purchase, as such, was not derogatory to the bride's or her family's status, suggesting (as it did) mere subsistence economy on their part. According to Medhātīthi on Manu, III.51,[1] "(śulka) is what is received from the bridegroom on stipulation. When there is bargaining, carried on in consideration of the good or bad qualitites of the bride - it is a case of pure selling." In other words, all that is received (by the bride's parents or the like) from the bridegroom for the sake of the bride, in connection with the āsura[2] form of marriage, is termed śulka. Both Haradatta[3] and Maskari[4] - the commentators on the Gautama-dharmasūtra, state that, "śulka means bride-price which is given in the unapproved forms of marriage as a consideration for giving the daughter in marriage."[5]

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1. Vide G.Jha, vol.II., pt.I, cit.above, p.83.
2. Refers to basic śāstric definition of āsura form of marriage; see e.g., Āpas. II.5.12,1. Also see Gonda at Lakshman Sarūp Comm.Volume, p.223 ff; L.Sternbach, Juridical Studies in Ancient Indian Law, I, (1965), p.347 ff.
3. Haradatta on Gaut.XII.38, vide H.N.Apte, A.S.S.61, cit.above, p.98. Also see S.B.E., vol.II., cit.above, p.244; and, (1950)52 Bom.L.R.,J., p.33.
4. Maskari on Gaut.XII.38, L.Srinivasacharya, ed., (Mysore, 1917), p.208; The Dharmakośa, ed. by L.Joshi (Vai, 1938), vol.I, pt.II, p.678 .
5. P.W.Rege, The law of Stridhana, (Ph.d. Thesis, Univ.of London, 1960), p.311; also see Chunilal v.Surajram, (1909) 33 Bom.433, p.442.

Thus, śulka as bride-price is taken to mean, "a gratuity for which a girl is given in marriage."[1]

It may be pointed out here that there existed an intriguing controversy as to what exactly constituted a 'selling'. According to Vasiṣṭha (I.36), "... when the present of a chariot and a hundred cows is made, it is known as selling,"[2] but on the other hand, in the view of Āpastaṃba[3], such a gift to the girl's guardian (as described above) has been prescribed with a view to securing a special end and for a righteous purpose ... which present joins the couple in wedlock; the applying of the term 'selling' to such giving of the girl is a mere declaration because the acceptance of the present is for a righteous purpose.

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1. According to the Mit. on Yājñ. II.144,
   Yaddattam śulkam yadgṛhītvā kanyā dīyate,
   i.e., "The gratuity, for the receipt of which a girl is given in marriage." For the text see, S.S.Khedwal, ed., Yājñavalkya-Smṛti, cit.above, pp.2o6-2o7; and for translation, see H.T.Colebrooke, Two Treatises on Hindu law of Inheritance, (Cal., 18o1), p.367; The Vīramitrodaya, V.1.3, vide, G.Sarkar Sastri, trans., (Cal., 1879), p.223; D.F.Mulla, Principles of Hindu law, (12th edn., Bombay, 1959), p.219; G.Banerjee, The Hindu law of Marriage and Stridhana, (2nd edn., 1896), p.272; or (5th edn., 1923), p.324; as well as f.n.3 on p.337; E.J.Trevelyan, Hindu Law, (3rd edn., 1929), p.475;
   It was held (in the context of succession to stridhana) that, "if the present is given to the girl or the father of the girl for the primary purpose of purchasing a bride or securing the marriage, then it would come within the definition of śulka." Śulka is explained here as falling under 'some idea of bride price'. - T.Surayya v.Balkrishnayya, A.I.R.1941 Mad.618, at p.619.

   Also in similar context, it was held that, "presents received by a bride from her parents cannot be considered śulka. To attract the application of special rules of succession to śulka, it must be distinctly alleged and proved by cogent evidence that the property given to a Hindu girl was of the character, the gift having been prompted by a desire to confer a pecuniary benefit, immediate or ultimate, on the parents who have been thereby induced to give her in marriage." - Arunachalam v. Sivakami, A.I.R. 1955, N.U.C. (T.C.), 1659.
   Also see, J.D.M.Derrett, I.M.H.L., cit.above, p.399.
2. Vasiṣṭha (I.36) quoted in the Notes on Manu, by G.Jha, (cited above), vol.III, p.187; also, vide G.Bühler, S.B.E., vol.14, (Oxford, 1882), p.7, as follows, "The purchase (of a wife) is mentioned in the following passage of the Veda, therefore, one hundred (cows) besides a chariot should be given to the father of the bride." Also see, Megasthenis' view that "They marry .. , giving in exchange a yoke of oxen." vide J.W. McCrindle, trans., Ancient India, (Lon., 1877), pp.7o-71.
3. Āpas., II.6.13.11 q. .Jha, cit.above, vol.III., p.186; correct reference should read: Āpas. II.6.13.12.

However, according to the translation of G.Bühler[1], it reads as, "In reference to those (marriage rites), the word 'sale' (which occurs in some smṛtis is only used as) a metaphorical expression, for the union (of the husband and wife) is effected through the law."

Thus, the difference of opinion between these two lies, not so much in the substance, but in the idea of selling (or purchasing) attributed to the nuptial present. The latter justifies his view on the ground that it tends to fulfil a righteous (dhārmic) end, i.e., uniting the couple in wedlock. Provided this takes place, it appears that Āpastaṃba has no objection even if the gift is used by the girl's guardian. But Vyāsa, through the mouth of Bhiṣma, offers a different opinion.

Bhiṣma says,[2]

> prācetasasya vacanam kīrtayaṃti purāvidaḥ /
> yasyāḥ kiṃcinnādadate jñyātayo na sa vikrayaḥ //
> arhaṇam tatkumārīṇāmānṛśaṃsyatamam ca tat /
> sarvam ca pratideyam syātkanyāyai tadaśeṣataḥ //
>
> "People learned in ancient lore, quote words of Prāchētasa to the effect that in cases where the relations do not appropriate anything for themselves, it is not selling, it is only a method of honouring the girls, and as such,entirely harmless and righteous; the whole of the present received should be made over to the girl."[3]

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1. Āpas.,II.6.13.12, S.B.E.2 (Oxford, 1879), pp.131-132.
2. The Mahābhārata, Anuśāsana-parva, 13.46.1-2, (critical Poona edn.,1966), vol. 17, pt.I, p.281.
3. The Mahābhārata, Anuśāsana-parva, 13.46.1-2, q. by G.Jha, in his Notes (cit. above), p.187;
It may be pointedhere that according to the translation of Mr.P.C.Ray, The Mahābhārata, vol.XIII, (Cal.,1905),p.114, it means,"However,good treatment and everything else which is agreeable, should all be given to the maiden whose hand is taken in marriage." Also, Manu, III.54, "In the case of girls whose relations do not appropriate the bride's gift, it is not 'selling', it is only a means of honouring the maidens and it is entirely harmless", seems almost identical to Bhiṣma's view. Vide G.Jha, ibid., vol.II, pt. I, p.85. Cf. V.V.Mirashi, at Indian Antiquary, 3rd series vol.I, (Bom., 1964), pp.174-175. Here, in Ephigraphic Notes - I, he suggests that according to an inscription of Samudragupta, the "bride-price (śulka) was paid in the form of manliness and valour (by Samudragupta)", etc.. Though imaginative, the meaning of śulka here points to that sort of payment which will ensure the maiden's own happiness, and not that of her parents or guardian.

Thus, it appears that by implication Vyāsa suggests that it is not a righteous practice of the relatives of the girl to appropriate for themselves the presents received in connection with her marriage. There is no doubt only this interpretation of customary practices arose.

For, Manu had gone further and positively stated that such an appropriation is deplorable and should not be practised. According to him,

> "The girl's father, if wise, should not accept even a small consideration; by accepting a consideration, through greed, the man becomes a child-seller." [1]

Medhātīthi explains that, "This verse prohibits the receiving of 'consideration' in connection with the Āsura form of marriage , ... " (for what he means by 'consideration', see above p.84). Further, at IX.98, we read:

> Ādadīta na śūdro api śulkam duhitaraṁ dadan /
> śulkam hi gṛhṇankurute channam duhitṛ vikrayam //[2]

"Even a śūdra should not take a nuptial fee (śulka), when he is giving away his daughter; by accepting a fee, what he does is disguised bartering."[3] Perhaps 'concealed sale' would be a better translation. The prohibition appears to be complete and total, though Bhāruci (7th cent.) in his commentory on this verse shows it is his view that śūdras were still permitted to conclude marriages with bride-prices. Any act contrary to Manu's deprecation was regarded as a sin[4] and (by some at any rate) even a 'crime'.[5] Baudhāyana goes to extremes and declares that, "a female who has been purchased for money is not a wife . ... and quotes Kāśyapa (or Kaśyapa) as stating

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1. Manu, III.51, vide here G.Jha, ibid., p.83; J.D.Mayne, cit.above, (7th edn. Madras, 1906), p.96.
2. Manu, IX.98, by G.Jha, ed., vol.II., cit.above, p.270.
3. Manu, IX.98, vide G.Jha, trans., vol.V, cited above, p.82; Medhātīthi explains this śloka as "the nuptial fee here spoken of is the same as what has been deprecated in another text"; (i.e. Manu, III.51) referred to above p. 84.
4. I.e. living on money obtained by 'selling' one's female relatives; Manu, III.52, vide G.Jha, vol.II, pt.I, cit.above, p. 83, Baudh.,I.11.21 q. by G.Jha, The Notes, cit.above, p.186; also see, G.Bühler, trans., S.B.E. 14, cited above, pp.207-7.
5. Baudh., I.11.21,3, op. cit., p.208.

that 'she is a slave'[1]" This view appears to be an erroneous one (probably an arthavāda, i.e., nindārthavāda) because marriage, according to the śāstras, is a necessary saṃskāra, a sacrament, and once performed according to the prescribed rites is valid - the presence of a financial consideration or otherwise cannot invalidate it.[2] Why, then, have these śāstras treated the bride-price as immoral and undhārmic? Govindasvāmī in his commentary on Baudhayana clearly says a daughter-seller obtains a mean rebirth and falls into hell.

It might be inferred from what has been stated above by Āpastaṃba (see p.85), that he wants to limit the scope of the 'present' to a gift made voluntarily for a righteous end - and no more. Bhiṣma wants, in addition, to see that the 'present' is ultimately made over to the girl.[3] Looked at from this point of view, the use of the present by anyone other than the girl transforms it into (a) bride-price, and (b) an act not leading to a harmless end, i.e., an immoral and sinful act. The reason offered by Manu is forthright. He prohibits taking a bride-price because it amounts to 'child-sale', which is an immoral act (see above p.87). Hemādri enumerates various penances considered to be appropriate by various śāstrakāras in the section on puttrīvikrayaprāyascittam.[4]

Baudhayana[5] treats this not only as a child-sale but also as selling 'oneself'. This, according to him, amounts to commiting a great 'crime', literally 'great stain'.

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1. Baudh., I.11.21.2, ibid., p.207; P.W.Rege, cit.above, gives this reference no. as I.11.21.4-5 on p.41 of his Thesis, because he was following the Kashi skt.Series (1934) edn. of the text.
2. J.D.Mayne, op.cit., 11th edn., p.134; Venkat v.Laxminarayana, (1909), 32 Mad. 185 (F.B.), It was held there that, "The marriage, once performed ... is valid."
3. Smṛticandrikā, IV.I.5; vide S. Setlur, A Complete collection of Hindu law Books on Inheritance, vol.I,(Madras, 1911), p.258; TheVīramitrodaya, V.I.3, vide, ibid., vol.II., p.440-41; also, vide C.Sarkar Sastri, cit. above, p.223; Medhā.on Manu, III.54, 'accepting of a present on behalf of the bride is permitted', vide G.Jha, cit.above, vol.II, pt.I, p.85.
4. P.N.Tarkabhusana, ed., Hemādri's Caturvargacintāmaṇi, Prāyascitta-kāṇḍam, (Cal., 1911), pp.157-158.
5. Baud., I.11.21.3, "Those wicked men who ... give away a daughter for a fee, who thus sell themselves* and commit a great crime ... and destroy their family down to the seventh (generation)." Vide G.Bühler, cit. above, S.B.E.14, p.208 - * according to the trans. of G.Jha, "soul-sellers", see, the Notes on Manu, cit.above, vol.III, p.186.

According to Vasiṣṭha, the matter seems to be even more serious. He quotes the Cāturmāsyas' as stating that, "she (forsooth) who has been bought by her husband (commits sin , as) afterwards she unites herself with others (strangers)."[1] It is obvious that if parents sell their daughters they sell to the highest bidder. Riches did not, in ancient India, go with high caste status or unblemished morals, any more than they do today. In sacramental terms the marriage by purchase is a merely secular acquisition of the girl. The gods do not give her to the bridegroom. Vasiṣṭha's idea arose perhaps because the bride came from a blemished family[2] (due to her father, who took purchase money from her husband).[3] This inference, that the daughter also becomes tainted due to the father's sin, might be debatable, but in comparison with what we have noticed so far, the implications of Vasiṣṭha's assertion are far more serious; they brand śulka, as the emblem of the Āsura marriage, as destructive of dharma and morality.

Is there anything justifying acceptance of the bride-price? Āpastaṃba, as we have already seen above (p.85), seems to defend it (as a present) on the ground that it is meant for a righteous purpose, and thereby it helps, perhaps, to uphold dharma. One might be inclined to accept this argument provided it is followed not only in the letter but also in spirit. But from the practical point of view, especially considering human weaknesses, one could hardly be sure of its not being misused for the benefit of wicked fathers or the like, for there was no machinery to compel fathers of girls to hand over the consideration to them.[4]

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1. Vasiṣṭha, I.37, vide G.Bühler, cit.above, S.B.E.14, p.7.
2. Vasiṣṭha, I.38, "Lost learning comes back, when the family is lost all is lost; even the horse becomes estimable on account of its pedigree; therefore men marry wives descended from an (unblemished) family." Ibid.
3. Baudh., I.11.21.3, vide, S.B.E.14, op.cit., p.2o8.
4. Compare Dowry Prohibition Act, Act 28 of 1961, sec.6, (see J.D.M.Derrett, cit.above, I.M.H.L, p.6o9) a dead letter.

Another argument put forward in defence of the bride's father suggests that a part of the bride-price went to him "as compensation for the patriarchal or family authority which was transferred to the husband."[1] This might well be so in those days, but in view of a Hindu father's sacred duty to give his daughter in marriage to a suitable husband,[2] the claim based on this authority seems illusory and contradictory.

Now, considering the above arguments, both in favour of and against bride-price, it appears that the śāstrakāras were right in treating it as an illegal and immoral (undhārmic) practice for the reasons given above. They had no objection, however, to a gift, given and taken as such, provided it was in the interest of dharma and for the benefit of the girl. Evidence of the latter would be its finding its way eventually into her hands in the shape of jewellery or household furniture.

This view appears to have been followed[3] and confirmed by the majority of the modern decisions, and, especially, the

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1. N.R.Raghavachariar, Hindu Law, cit.above, (4th edn., 1960), p. 492; Kauṭilya, IV.12.9, here Kauṭilya in the context of the failure, after betrothal, to give his daughter to the bridegroom, states that, "the (latter, i.e., the father) forfeits his ownership by (his acts) making her periods vain."
Vide R.P.Kangle, trans., Kauṭilīya Arthaśāstra, pt.II, cit. above, p.330.

2. The Full Bench observed in Venkat v.Laxminarayana, op.cit., at p. 187, "It is clearly opposed to the dictates of justice, equity and good conscience to allow a father to make a profit out of the fulfilment of the duty imposed upon him by Hindu Law of finding a suitable husband for his daughter ... "

3. In Keshow Rao v. Naro Junardhun, Borradaile's Reports, vol.II, (Bom., 1862), p.215, at p.223.
In this case the śāstric injunction was followed and the son was not held liable.

idea of selling or purchasing of a child[1] (a daughter or a son[2]) seems to be the basis; the taint of which, in their opinion, makes it immoral and opposed to public policy. Also, the modern decisions appear to discourage this practice (as observed by the appeal court[3]) for, "it is obvious that such an agreement (claiming a local custom allowing bride-price to be enforceable at law) is derogatory to the happiness and welfare of the child as it acts as an incentive to the guardian to have regard to considerations other than the child's happiness in marrying her into another's family. The child is given away to the highest bidder without having the least regard for her welfare."

Of course, this assertion has its own limitations and therefore its application will depend on the facts of each case. It is impossible to generalise in this way because not each and every parent or guardian of a child is of the same attitude and feelings so as to be always guided by this kind of incentive.

In Bhagirathi v. Jokhu Rama,[4] however, it was helf that the āsura form of marriage was (then) quite common, that the purchase of a bride was quite common, and that it could not be held that the money which was raised was not part of the expenses of a legal marriage. With respect, it must be pointed

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1. T. Surayya v. Balkrishnayya, A.I.R. 1941, Mad.618,619, "But, these same classes of gifts if not tainted with the idea of purchase, being simple gifts to a prospective bride, would not fall within the definition of śulka;" Venkat v. Laxminarayana, op.cit.; In this case the Court said on the p.186 (while referring the issue to F.B.) that, "we should have no hesitation in holding that such agreements for payment to a father in consideration of his giving his daughter in marriage are immoral and opposed to public policy whether the question be approached from the standpoint of Hindu law or justice, equity and good conscience which we are bound to administer." In D.Chetty v. M.Chetty,(1914) 37 Mad.393 at pp.395-6; per White C.J., "It is true ... that no money is payable as 'bride-price' to anybody. ... It is now established ... that a contract to make a payment to a father in consideration of his giving his daughter in marriage is opposed to public policy within the meaning of section 23 of the Contract Act."
2. Dholidas Ishvar v.Fulchand Chhagan,(1897), 22 Bom.658. It was held in this case that, "a contract which entitles a father to be paid money in consideration of giving his son or dauther in marriage is against public policy and cannot be enforced in a Court of law"; Cf. Subbaraju v. Narayanaraju, (1926) 51 M.L.J. 366.
3. Gulabchand v. Fulbai, (1909) 33 Bombay, 411 at p.414.
4. (1910) 32 All. 575.

out here that this appears to be an attempt to ignore the illegal and immoral nature of āsura marriage (due to the taint of payment of bride-price), against the dictates of the śāstras as well as modern Hindu law, simply because it was 'common'. This seems too weak a ground[1] to justify the deviation from the majority view based both on the śāstras and on sound principles of 'justice, equity and good conscience.

Now, before we turn to examine another meaning of the word śulka, it may not be out of place to note here that the inappropriate word 'fee' in English has been used to denote śulka (both as bride-price and as gratuity ultimately passed to the bride) by different translators.[2] However, we need not be confused.

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1. In comparison, however, the argument put forward by T.Strange at p. 167 of his Hindu Law, vol.I (London, 183o), appears more justifiable (though in a different context). What he meant there by 'nuptials' seems to be 'marriage expenses in general' rather than the 'bride-price'.

2. a) Viṣnu XVII.18, the word śulka here has been given the following three different interpretations: 1. 'fee, as one of the items of Strīdhana; 2. fee denotes the price or value of a house or other valuable object presented to the bride by her father; 3. or it means the fee paid for her by the bridegroom (i.e. the bride-price); see, J.Jolly, Institutes of Viṣnu, S.B.E.7, cit.above, p.69;

   b) Gautama, XII. 41 quoted in Vivādacintāmaṇi, pp.28-29, herein according to G.Jha's translation, śulka means 'fee' (bridal); Haradatta explains it as meaning that which was to be paid to the parents of the girl (i.e., bride-price); also in G.Bühler's translation of this in S.B.E.2, p.241; Haradatta on Gautama XXVIII.25 is said to have meant by śulka therein 'the fee i.e., the money which at an āsura or an arśā wedding, the father has taken for giving the sister away'; see, G.Bühler, ibid., p.3o3.

   c) Vyāsa quoted 1) by Jimūtavāhana, Dāyabhāga, IV.III.21,* translation of which is given as 'bribe' (i.e., inducement) to bring birde to her husband's family;
   Kātyāyana quoted 2) by Jimūtavāhana (ibid.) IV.III.2o, where śulka is translated as 'bribe' given to a woman to send her husband to ... labour;
   Kātyāyana quoted again at IV.III.19, ibid., śulka means 'price of household goods etc.',
   vide here the trans.of H.T.Colebrooke, Two Treatises on Hindu Law of Inheritance, cit.above, pp.92-93.

(f.n. continued next page)

ŚULKA AS DOWER OR DOWRY: We have noticed above the deprecation of bride-price. The śāstrakāras appeared to agree unanimously on this point. This did not mean, however, the end of the bride-price. In spite of the dharmaśāstra's disapproval, śulkam as a dowry (which in fact appears here [1]

(f.n. continued from the last page)

* According to Colebrooke (f.n.21) 'what is given to bring the bride'. Cuḍāmaṇī notices a variation in the reading of Vyāsa's text - ānītam for ánétam, "what is brought while the bride is going to her husband's house" instead of "what (is given) to bring her to her husband's house." P.W.Rege (cit.above) seems to agree with this view (p.7o-71) In this sense, it may be noted, that śulka means dowry. G.Banerjee (cit.above), pp.491-92, appears, however, to agree with Colebrooke's translation.
Also, Vyāsa q. in Jagannātha's Digest, vol.III, verse 471, p.57o; Colebrooke translates śulka as bribe to a bride. J.D.M.Derrett says, it may be treated 'practically obsolete at I.M.H.L., cit.above, at p.4o3.

"But the Cintāmaṇi and the Vivādaratnākara (p.525) both take the term in an entirely unusual sense; the latter remarks 'the śulka is the money that is given to the woman by the servants of the house, by way of bribe for keeping them in good graces of the Master'. This again is different from the explanation of the Cintāmaṇi above;" (i.e. śulka in the sense of price of household goods etc.) vide G.Jha, The Vivādacintāmaṇi (f.n. on verse 96o), op.cit..
We find all these ideas meet at a phrase like 'bride's perquisites'. It is obvious that not all of them can be debts!

1. Kaut. 3.2.7 read with 3.2.11; - "For those two (i.e.parents) receive the dowry of the daughter, or one of them in the absence of the other", and 3.2.19, which states that on the death of her husband she shall receive the remainder of the dowry (śulkaśeṣam). In the f.n. 19, Kangle states that "the śulka goes to the bride's parents (s.11). It may be that parents who receive the śulka hold it in trust for the daughter."
Vide R.P.Kangle, trans., op.cit., II, pp.227-28.

not to vary greatly from bride-price[1]) has been mentioned in the context of women's property (strīdhana)[2], as well as in the context of debts (not recoverable from sons or heirs) by Kauṭilya.[3] But at the same time the references that the wife in certain circumstances either receives[4] (herself) or has to forfeit[5] the dowry, suggest that during

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1. This view is strengthened if we take into account Kauṭ.4.12; especially the following ślokas on the consequences of violations of maidens:
   Kauṭ. 4.12.4, "and he (who violates a maiden) shall make good the loss to her father";
   Kauṭ. 4.12.7, "if she (the maiden) has been reserved by the dowry of another, ..., as well as the payment of dowry"
   Kauṭ. 4.12.8, "A bridegroom not receiving the bride after betrothal, ... shall have right (to her) ... and shall not make good the father's loss";
   Kauṭ. 4.12.15, "For a (bride) not a virgin at the time of consummation, the fine ..., and (she) shall return the dowry and (marriage) expenses"; (also, the f.n.15 there, on this śloka.)
   Kauṭ. 4.12.18, "And he (who falsely accuses the bride of loss of virginity), "shall lose the dowry and the expenses."
   Kangle, ibid., pp.33o-331.

2. For a concise exposition, see P.Mukherjee, at Our Heritage, 'Property Rights of Women as Recorded in Kauṭiliya Arthaśāstra and Manusmṛti', - vol.9, (Cal., 1961), 47, pp.52-58.

3. Kauṭ. 3.16.9 (ibid.) p. 281.

4. Kauṭ. 3.2.19, which is "When the husband is dead, the (widow) if desiring of leading a life of piety, shall forthwith receive the endowment and the remainder of the dowry." Ibid., p.228. See above p.93, f.n.1.

5. Kauṭ. 3.4.15, "If, even on such occasions", (i.e., those which are normally allowed to attend without her husband's permission), "she conceals herself, she shall forfeit her woman's property, or the kinsmen concealing (her, shall forfeit) the balance of the dowry."
   Ibid., p.237.

this period in question women themselves, either in place of or along with their parents, shared the dower. In this connection, one wonders whether the practice possibly relates to a social custom analogous to Islamic law according to which prompt dower was paid at the consummation, and the balance was a charge, as it were, on husband's estate. For, here is the reason why sons were approached to pay the balance: śulkaśeṣam. We have no śāstric or other proof that there was such a custom; but, if this were not true, it is difficult to explain Kauṭilya's views on the subject.

What all this seems to indicate, is, probably, the result of interaction between the śāstric ideals and the materialism (based on practical values of life) of the arthaśāstra. Although Kauṭilya does not appear openly to prohibit śulka to be given or taken, he seems to agree with the smṛtikāras when he allows sons or heirs, if they so wish, to refuse payment of debts incurred by the father by way of a balance of śulka.[1] This transitional period appears to have resulted in converting śulka into something similar to a 'dowry' properly so called.

"The introduction of dower", however, during the later period, "denotes that the Aryan society of Viṣṇu's time was inclined to be guided by Manu's censure against a father who received money for his daughter, and instead of preventing this practice altogether, thought of converting the bride-price into stridhana of the bride herself."[2] If this was realised, the result would have been almost identical to what Bhiṣma (see above p.86) wanted to have, which modern decisions generally approve (see above pp.87 and 91, and f.n.1 on p.91)

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1. Kauṭ., 3.16.9, "The son or heir inheriting the property may not pay, if unwilling, obligations of suretyship, balance of a fine or dowry (śulka) a gambling debt, a debt for drinks and a gift of love." (Here it seems to mean 'of lust'). Cf. Manu, VIII.159; Yājñ. II.47; etc. Ibid., p.281; also see R.Shamasastry, trans., Kauṭiliya Arthaśāstra, (1915), p.22o.

2. P.W. Rege, op.cit., p.64.

i.e., śulka, in the true sense of a present to the bride.[1]

Conclusion: It may be stated in conclusion that

1. bride-price and dowry (as understood by the arthaśāstra) are apparently synonymous terms;
2. the dharmaśāstras treated such practices as taking a bride-price as immoral and undhārmic since they amounted to a child-sale, which the śāstrakāras deprecated;
3. this view of the śāstrakāras seems to have been relied on and followed by the modern decisions, for according to them,
4. the idea of selling or purchasing of a child forms the basis, the taint of which makes it immoral and opposed to public policy.

Thus, in connection with marriages, it is the primary purpose for which the present is given or accepted , which determines the legality and morality or otherwise of the present concerned. It is quite clear, then, that any debt of a Hindu father, which falls within the definition of śulka in the sense of the bride-price, is outside the son's liability to pay his father's debts, because such debts are, as we have seen above, immoral and illegal debts.

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1. Raghavānanda on Manu, VIII.369. Śulka means here a present to ingratiate oneself. This may arise when the male is exceptionally attached to the girl but the girl does not reciprocate his affection, or when she is especially relied upon (to agree to the match) because of unusual proximity: in either case a special penalty is called for. .... śulkam ... viśeṣaḥ (this supposes a society in which bride-prices as such are repudiated, but the onus still lies on the boy's family to get this marriage arranged)

ŚULKA AS A TOLL, TAX, CUSTOMS OR DUTY: In the course of explaining the results of non-performance by the king of his duty to protect his subjects, Medhātithi[1] on Manu, VIII.3o7, defines 'tax' 'karo dravyādānam'as what is paid in cash, and 'duties' 'śulkam vaṇikprāpyabhāgaḥ' as what the tradesmen pay. But, to some,[2] śulka denotes lawful taxes in general.

According to the Mitākṣarā on Yājñavalkya, II.261, śulka seems to mean a sales-tax. Yājñavalkya, II.261 reads:

> Ardhaprakṣepaṇādviṃśam bhāgam śulkam nṛpo haret /···· rāja-gāmi tat // 3
>
> "The king shall take as a tax a twentieth share of the price fixed (by him) .... it belongs to him."[4]

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1. Vide G.Jha, vol.IV, pt.II, cit.above, p.34o; for Sanskrit terms, see G.Jha, ed., op.cit., p.2o2.
2. "On account of sūtras immediately following, it is, however, more probable that the term is here used as a synonym of kara and includes all taxes. 'Lawful taxes are, of course, those sanctioned by custom and approved by the smṛtis", observed G.Bühler in the translation by him of Āpastamba Dharmasūtras, S.B.E.2, pt.I, (Oxford, 1879), p.162; f.n. on Āpas.II.1o.26(9);
   According to Kangle's gloss on Kauṭ.2.6.3, 'Karaḥ appears to be a tax paid in cash'; vide his trans., op.cit., p.II, p.87, f.n.3.
   In this sense, the above observation of G.Bühler that the term śulka is synonym of kara would appear incorrect, but even Kangle himself appears to be doubtful about his own gloss.
3. Yājñavalkya - Smṛiti, ed. by J.R.Gharpure, (1st edn., 1914), pp.142-143; L.Sastri Joshi, Dharmakośa, Vyavahārakāṇḍa, vol.I, pt.II, (Vai, 1938), p.773.
4. Mit. on Yājñ., II.261, see the translation of J.R.Gharpure, (Bombay, 192o), p.378; also, see Haradatta on Āpas, II.1o.26 (9), ...'śulka is the 1/2oth part of a merchant's gain,' referred to here in the trans. of G.Bühler, cit.above, f.n.2 above); also for the similar view, see Manu, VIII.398 and Gautama, quoted in the Vivādacintāmaṇi, see trans. of G.Jha, cit.above, p.122, but according to the Vivādaratnākara (p.3o4), quoted in f.n. thereunder, this refers to merchandise bought from foreign lands. Viṣṇu, on the contrary, applies this to 'goods sold in another country'; see Viṣṇu, III.3o, see the trans. of J.Jolly, S.B.E.7, cit.above, pp.15-16.

However, Viṣṇu says, "Let him take a tenth part of (the price of) marketable commodities (sold) in his own country".[1] This, however, is immaterial from our point of view.

Viśvarūpa, while commenting on Yājñ., II.53,[2] renders the same word as

śulkam pathi rājabhāvyam dānam /

i.e., śulka is a payment which is a duty due to the king upon the road.

The term śulkam in Kauṭilya, II.6.2, is rendered as 'custom-duties', while the same word in Kauṭ., II.12.35[4], has been translated as 'duty'.

Kullūka[5] on Manu, VIII.159, says,

śulkam ghaṭṭādideyam /

which means what is to be given at the gate i.e., a toll. G.Bühler[6] renders śulka as payment of a toll at a ferry; while B.S.Moghe[7] says that "śulka should be understood as jakāt, kara, dhārā, etc.", which means a toll paid at the city-gate or at a ferry.

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1. Viṣṇusmṛti, III.29, vide J.Jolly, op.cit., p.15.
2. Yājñavalkyasmṛti with the commentary of Viśvarūpa, edn.by T.Ganapati Sastri, (Trivendrum, 1922), p.22o; according to H.N.Apte's edn.(of Aparārka on Yājñ.),A.S.S.No.46, cit.above, p.648; this verse is enumerated as Yājñ., II.47. Also, see Kauṭ.2.6.3; the road-cess is mentioned here without using the word śulka. R.P.Kangle, pt.I., p.41; and pt.II, p.87.
3. Ibid., pt.I, p.41, and pt.II, p.86.
4. Ibid., pt.II, p.126; also Kauṭ. 2. 22 deals exhaustively with the tariff of duties and tolls, see pp.166-167.
5. V.N.Mandlik, ed., Mānavadharmaśāstra,cit.above, p.975; also, Mānvārtha-Muktāvalī, quoted by R.K.Ranade at (195o) 52 Bom. L.R.,J., 33 at p.35. Also see J.Hoshing, ed., Hemacandra's Anekārthasaṁgraha, (Benares, 1929), p.4,

śulkam ghaṭṭādidātavyejāmātuścāpibandhake /

6. Vasiṣṭha, XIX.16.25, S.B.E.14, (Oxford, 1882), p.99.
7. Mitākṣarā on Yājñ. II.47, vide S.B.Moghe's translation in Marāṭhi, called Yājñavalkyasmṛti, Vyavāhārādhyāya, cit. above, p.1o2.

Thus, even if there is a difference of opinion among the śāstrakāras and the commentators as to the quantum of amount of tax to be paid, we are left with hardly any doubt that the word śulka may mean a sales-tax, or a road-tax, custom-duties, a duty, a toll, and that these duties were lawful dues owed to the king."Śunka was unquestionably the consolidated estimate for the customs and excise dues for the area,[1] and "our sources indicate that śulka was the most important item of royal income."[2]

But why should the duties be due to the king? And, if these were his dues, then why should a debt, incurred by way of non-payment of tolls etc. by a Hindu father, be exempted from his son's liability to pay it?

According to the śāstrakāras, the protection of his subjects shall be done by the king in accordance with the provisions of 'law'.[3] 'Law' stands for the scriptures, especially the scriptures dealing with dharma or duty. The protection was necessary to guard the weak against the strong, and to see that they do not transgress righteousness. "'Protection' means saving from troube; the transgressing of law brings imperceptible (adṛṣṭa, supernatural) trouble; so that when people do not transgress it, they become saved from that trouble by the king."[4] How could he do so? He was expected to achieve this with the help of punishment: by punishing culprits who transgressed. Of course, this involved, e.g., investigation of the such cases. Again, the king was

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1. J.D.M.Derrett, The dynastic History of the Hoyasaḷa Kings, Ph.D.Thesis, University of London, (1949), p.549. Śuṅka is same as Sanskrit śulka which means tolls; vide D.C.Sircar, Indian Epigraphical Glossary, cit.above, p.424. Also see G.S.Dikshit, Local Self-Government in Mediaeval Karnataka, cit.above, p.171. Also see, D.N.Jha, Revenue System in Post-Maurya and Gupta Times, (Cal.,1967), pp.72-78. At p.76 it is stated in respect of śulka "that it was a tax on commodities realised from traders and merchants, and that it may have included taxes on both foreign and indigenious articles." Also, B.Bhattacharya, trans., Daṇḍaviveka, cit.above, p.5.
2. D.N.Jha, op.cited, p.73.
3. "The protection of all this shall be done according to'law'(dharma),by the Kṣatrīya who has received the Vedic training in due form." - Manu, VII.2, G.Jha, trans., vol.III,pt.II, cit.above, p.274.
4. Medhātīthi on Manu, VII.2; G.Jha, ibid., p.275.

expected to do this and decide cases in strict accordance with the ordinances of scriptures.[1]

> Daṇḍena nīyate ceyam daṇḍam nayati cāpyuta /
> daṇḍanītir iti prokttā trīṃllokān anuvartate //[2]
>
> "And because men are led (to the acquisition of the objects of their existence) by chastisement, or, in other words, chastisement leads or governs everything, therefore, will this science be known in three worlds as daṇḍanīti (science of chastisement)." 3

Thus it appears that according to the dharmaśāstra, it was the king's duty to secure a good administration of justice. But why? Obviously, to maintain law and order for the sake of peace and prosperity of the people and his realm; (see below f.n.1). A modern writer on the subject has stated that this royal function of protection covers the whole scope of dharma as the smṛtis conceived it: ācāra, prāyaścitta and vyavahāra.[4] In this sense, the royal function is essential not only for the benefit of society as a whole but also for this reason that the śāstrakāras have treated this as the

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1. Medhātīthi on Manu, VIII.1 reads as follows: "Prosperity of the people i.e. kingdom; King's duty is to protect (removal of trouble) the people; and to fulfilling this duty and thus to preserve the kingdom, he must investigate the cases of people and decide in strict accordance with ordinances of scriptures"; the trans. of G.Jha, ibid., vol.IV,pt.I,p.2;

2. The Mahābhārata,śāntiparva, 12.59.78; S.K.Belvakar, ed., The Mahābhārata, vol.13, pt.I, cit.above, p.269.

3. P.C.Roy, trans., The Mahābhārata, (of Vyāsa), vol.VI-VII, śāntiparva, (Cal., 1926), p.134; also see, M.N.Dutt, trans., The Mahābhārata, books 8-18, śāntiparva, chap.LIX, 78, (Cal., 1903), p.85.
   Cf. The Mahābhārata, 12.59.91-92, (see Poona critical edition, op.cit., p.271), which tell us how this science was abridged so as to suit decreased life-span of human beings (and everything else) in order to benefit all (the world).
   Also see, P.C.Roy, trans., op.cit., p.135; M.N.Dutt, trans., op.cit., p.85, (here the verses are 85-86).

4. R.Lingat, The Classical Law of India, cit.above, p.223.

highest among all duties of the king;[1] and precisely because of this royal function of protection they have conferred upon him, it seems, the right to collect taxes from his subjects.[2] "In fact, the right to take revenue is only an adjunct to the royal function, intended to give the king the means to secure his proper subsistence and to govern his realm."[3] This, however, does not mean that only those

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1. Manu, VII.144, "The highest duty of a kṣatrīya is to protect his subjects, for the king who enjoys the rewards, ..., is bound to (discharge that) duty." Vide G. Bühler, S.B.E.25, cit.above, p.238;
Also, the Vīrmitrodaya on Yājñ., I.335-36, "With a view to point out the protection of subjects as a principal one among the duties of a king, the author mentions the highest fruit from the protection of subjects." Vide J.R.Gharpure, trans., The Collection of Hindu Law Texts, vol.II, pt.II, (Bombay, 1937), p.598.

2. Baudh., I.1o.1, "Let the king protect (his) subjects receiving as his pay a sixth part (of their incomes or spiritual merit)"; vide here the trans. of G.Bühler, S.B.E.14, cit.above, p.199. Nārada, XVIII.48, reads, "Both the other customary receipts of a king and what is called the sixth of produce of the soil, form the royal revenue, the reward (of a king) for the protection of his subjects." Vide here the trans. of J.Jolly, S.B.E.33, (Oxford, 1889), p.221; cf. Medhā. on Manu, VIII.1, cit.above, f.n.1, p.1oo, where he mentions taxes, duties as part of his lawful means of livelihood; see also, Manu, VII.137, at S.B.E.25 , cit.above, p.237; Manu, VIII.3o4 states, "A king who (duly) protects (his subjects) receives from each and all the sixth part their spiritual merit; if he does not protect them, the sixth part of their demerit also (will fall on him)." Ibid., p.3o7; Cf.Manu, VIII.3o7,3o8; Ibid., pp.3o7-3o8; Yājñ.I.337, vide J.R.Gharpure, cit.above,(see f.n.1 above), pp.599-6oo. Medhātīthi on Manu, VIII.3o7 says that "the meaning of the verse is that - 'for fear of having his life span cut short and sinking into hell, the king should receive his dues and afford protection to the people'." Vide trans. of G.Jha, vol.IV, pt.II, op.cit., p.34o.

3. R.Lingat,cit. above, p.213;
Also, J.D.M.Derrett, 'A new Treatise on the nature and sources of the Dharmaśāstra', Purāṇa, (Varanasi, 1968), pp.77-94, at p.92, says, "The kṣatrīya has the right to take taxation and to punish offenders."

who pay taxes are eligible for the protection and not the rest. Medhātīthi on Manu, VII.2[1], has explained very clearly that protection should be extended to all those 'who pay the taxes, as well as those who are poor and helpless.'

This brief discussion, in search of an answer to our first question, leads us to believe that according to dharmaśāstra the right of the king to tax his subjects is justifiable in the interest of welfare of the people in his kingdom, as well as on the ground of upholding dharma. Besides, in view of the inability of poor and helpless section of the society, it appears, by implication, that those who are liable and able to pay taxes have greater responsibility than what appears, on the face of it, to be solely necessary for the survival of the king.

In view of the above, turning to our second question, one might be tempted to reply hastily that the avoidance of the payment of tolls and taxes by a Hindu father is prima facie not only illegal but also immoral and hence (since immoral debts are exempt), outside the liability of his son to pay it. But is it, in fact, so?

Let us have a closer look at the above statement. The avoidance of payment of śulka, tolls or duties, appears to be immoral or illegal, and hence the debt is said to fall outside the liability of a Hindu son.[2] But one detects absurdity in this; for the son, who inherits the fruits of his father's ill-gotten fortunes, made (in part) by way of non-payment of śulka, is exempted from the liability to pay his father's debt which is incurred by way of non-payment of śulka, lawfully due to the king. The absurdity latent in the statement could easily be illustrated.

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1. Medhātīthi explains the words 'of all this' in this verse of Manu as meaning (a) 'of all' - who pay taxes, as well as those who are poor and helpless; (b) 'this' - this refers to the people living in his kingdom, in villages as well as in cities. Vide G.Jha, cit.ab.,(see f.n.4 on p.99),p.275.
2. Gaut., XII.41; Manu, VIII.159; Yājñ., II.47; Vasiṣṭha, XVI.31; Bṛhaspati, XI.51; Vṛiddha-Hārīta, IV.142; Vyāsa, (acc.to the Vivāda-ratnākara) and Uśanas (acc.to the Mitākṣarā), see J.C.Ghose, Hindu Law, 3rd.edn., cit.above, p.546.

Suppose there was a clever businessman named F. His sole ambition was to accumulate as much wealth as he possibly could. He therefore employed, besides hard work, all the tricks he knew: cheating, fraud, bribes etc. Thus he succeeded in making a huge fortune, which was inherited after his death by his only son S. There were, however, a few cases pending, regarding certain claims against F, arising out of his evasion of the payments of tolls etc..

His son's advocate pleads that even if the claims against F were true and would be proved, S could not be held liable to pay because of the exemption, granted in favour of Hindu sons by the dharmaśāstra[1] as well as the arthaśāstra,[2] which releases S from this liability.

The court which was required to decide cases in accordance with the rules of dharmaśāstra, would appear to have been left with no other choice than to agree, perhaps unhappily, with the advocate and leave S free to enjoy the wealth. And all this would appear to have taken place in spite of the fact that such an act of avoiding tolls, as in this case, might ultimately endanger the existence of the king, upon whose strength and survival depends the welfare of the people and the survival of dharma itself (see above p.101). Surely, the aim of the principles of the dharmaśāstra could hardly be expected to lead to the destruction of dharma itself. From the information available[3], it is apparent that merchants employed various tricks to avoid payment of tolls. This was and is unrighteous behaviour. Thus, unpaid tolls could be a burden on the soul and the whole toll as well as unpaid balances (due to fraud etc.) ought in righteousness to be paid by the sons, for their own joint family assets benefited from the fraud.

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1. Ibid.
2. Kauṭ., III.16.9.
3. "People will sell goods mostly with false weights and measures and traders will be full of many tricks;" vide P.V.Kane, H.Dh., vol.III, (Poona,1946), p.894; "While ..., smuggling with a view to avoid payment of tolls was to be punished and doubtless it was also practised." A.Appadorai, Economic Conditions in S.India, vol.I,(Mad., 1936), p.428; also see the following part of this chapter.

On the other hand, the situation might be quite different from the one described above: the father might squander all his wealth and leave behind only the liabilities arising out of his misdeeds, such as described above, for his son, perhaps a completely innocent person, to pay. We must, therefore, investigate and try to determine the proper import of the above exception in so far as it concerns the liability in respect of non-payment of śulka, a toll, from the point of view of the śāstrakāras. What, in their opinion, was the connotation of this liability which made them place it almost in the same category as that of daṇḍa, a fine?

The śāstric law on this is laid down in several smṛtis and the commentaries upon them. But before we start the discussion of the śāstric law, let us attend to a minor point first. To begin with we must appreciate variations in degrees of 'guilt' attributable to the wrong-doer who incurs the liability. For it is the seriousness or otherwise of the guilt which in turn would have been likely to be taken into consideration while deciding the penalty for the act in question For example, if we understand a śulka-liability to arise out of unpaid śulka, unpaid tolls, then there are likely to be various degrees of liabilities depending upon whether the non-payment is deliberate or circumstantial, innocent or intentional, first or repeated and so on and so forth. But we need not involve ourselves in these permutations in order to compute these variations. What we really need to know is the sort of liability - its nature or character. What sort of unpaid tolls, then, did the śāstras and the commentaries upon them judge as qualifying for inclusion within the exceptions in favour of Hindu sons, along with daṇḍa? Perhaps those outstanding by reason of toll-evasion? Thus, Manu says,

> Śulkasthānam pariharannakāle krayavikrayī /
> mithyāvādī ca saṃkhyāne dāpyo aṣṭaguṇam atyayam //[1]

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1. Manu, VIII.4oo, V.N.Mandlik, ed., Mānavadharmaśāstra, cit.above, p.11o6; Manusmṛti with Manvarthamuktāvalī, (Nirṇayasāgar, edn. Bom., 192o), p.336; Pandit J.Vidyasagar, ed. Manusaṃhitā with comm. of Kulluka Bhaṭṭa, (Cal., 1874), p.434; Daṇḍaviveka of Vardhamāna, G.O.S., vol.52, (Baroda, 1931), p.93; L.S.Joshi, Dharmakośa, vol.I, pt.III, (Wai, 1941), p.17o6.

> "He who avoids a custom-house (or a toll), he who buys or sells at an improper time, or he who makes a false statement in enumerating (his goods), shall be fined eight times (the amount of duty) which he tried to evade." [1]

In short, according to Manu, he who tries to evade the payment of tolls should be made to pay eight times the amount of duty which he tried to evade. Bhāruci[2] on Manu, VIII.4oo, says that in these circumstances the customs must be paid eight times over. "śulkam aṣṭa-gunam dāpyam." But according to this view the payment does not seem to be regarded as quite the same as suggested above, namely daṇḍa, a fine.

It is Kullūka[3], on this śloka of Manu, who notices that the word daṇḍa is not used by Manu. Instead, the word is atyayam which, according to him, means daṇḍarūpatayā, i.e. 'by way of fine'. Thus, he glosses,

> śulkakhaṇḍanārtha vikreyadravyasyālpām saṅkhyām vakti / rājadeyamapalapitamaṣṭaguṇam daṇḍarūpatayā dāpyaḥ //

He who declares less than the actual amount of sale for the purpose of reducing the due amount of toll, and thus avades what is due to the king, should be made to pay eight times that amount by way of fine.

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1. G.Bühler, trans., S.B.E.25, cit.above, p.324; Cf.the trans. of G.Jha, vol.IV, pt.II, cit.above, p.421; and that of Sir W.Jones, Institutes of Hindu Law or the Ordinances of Manu, (Cal., 1794), p.24o, Mānavadharmaśāstra, (Cal., 1888), p.134. It may be pointed out here that Sir William Jones appears to differ from both G.Jha and G.Bühler, when he states, 'shall be fined eight times as much as their value (meaning the valuc of the articles). The other two seem to mean, 'eigh times (the amount of duty) which he tried to evade." The Burnell-Hopkins translation, Ordinances of Manu (London, 1891), 241, f.n.6: 'Should be fined the eightfold fine'. So also, A.Loiseleur-Deslongchamps, Louis de Manou (Paris ND, 183o), 253 (amende, 'fine'). The assumption that atyayam = fine (daṇḍam) is understandable but unwarranted, though commentators, naturally, authorise it.
   As a matter of fact atyayam is ambiguous. It means 'evasion' and also 'offence': thus a true translation, bringing out the pun, would read,' outwardly, 'should be made to pay eight times his evasion-offence'! See Aparārka below.
2. In Bhāruci on Manu, this verse is numbered 398; see J.D.M.Derrett, trans., cit.above, p.2o7.
3. V.N.Mandlik, cit.above, p.11o6; Pandit G.S.Nene, ed., (Benares, 1935), p.283.

Medhātīthi,[1] on the other hand, glosses it (atyayam) daṇḍa; 'dāpyoṣṭaguṇam atyayam daṇḍaḥ'. According to him, however, it seems that the word atyayam has two slightly different meanings: a fine, and similar to that of a fine; because he says that whatever is gained, at the end, in the form of eight times (of śulka) money, is by way of (ādyam evāyuktam. atyayaśabdohi tatra samañjasaḥ (i.e. in conventional sense) fine).

Sarvajña-Nārāyaṇa[2] is quite clear on this verse. To him, śulkaṃ krayavikrayarājagrāhyobhāgaḥ /. Śulka is the king's share arising (or due) from buying and selling transactions. And according to him atyayam means wealth earned by the king (by way of tolls), atyayaṃ rājñyopacitaṃ śulkam /. Apparently he does not treat this word atyayam in the sense of a fine, daṇḍa, but probably in the sense of a balance due to the king because of fraudulent behaviour of the evader concerned.

Rāghavānanda[3] on this verse has made no comment on the problem before us, but Nandana[4] seems to agree, in part, with the view of Sarvajña Nārāyaṇa. He says, ~~chā~~taṃtadatyayamaṣṭaguṇam dāpyaḥ /. Here, atyayam seems to mean either 'excess of' or 'in multiples of', (i.e. eight times) of (what was concealed).

Govindarāja[5] treats this eightetimes payment as a fine, daṇḍa, but Vardhamāna,[6] while agreeing with this opinion, seems to treat atyayam as meaning a toll due to the king.

But Yājñavalkya has the following to say on the subject: mithyāvadanparīmāṇam śulkasthānādapasaran / dāpyastvaṣṭaguṇam yaśca savyājakrayavikrayī //[7]

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1. V.N.Mandlik, cit.above, p.1106; G.Jha, cited above, p.421.
2. V.N. Mandlik, cited above, p.1106.
3. Ibid.
4. Ibid.
5. V.N.Mandlik, ed., The Commentaries of Govindarāja on Mānavadharmaśāstra, (Bom., 1886), p.127.
6. Daṇḍaviveka, cited above, p.93.
7. Yājñ., II.262; V.N.Mandlik, ed., Yājñavalkyasmṛti, (Bom.,1886 p.148; J.R.Gharpure, ed., Yājñ.smṛti, with Mitā., (Bom.,1914) p.142; L.S.Joshi, Dharmakośa, cited above, p.778.

"He who falsely declares the quantity (of the articles of sale), who withdraws himself from the place of (collecting) a tax, and he who purchases and sells fraudulently, shall be made to pay eight times (the value of commodity?)"[1] This penalty could be more severe than the one Manu or the commentators above have prescribed, if our conjecture as to the meaning is correct.

For the Mitākṣarā on Yājñ.II.262, appears to explain the matter thus: te sarve paṇyādaṣṭaguṇaṃ daṇḍanīyaḥ /[2] ... all these shall be fined eight-times the amount of value of the commodity.[3] Also, the Vīramitrodaya[4] on the same verse seems to agree with the Mitākṣarā when it states, paṇyādaṣṭa-guṇaṃ daṇḍa dāpyaḥ /; which means almost the same thing.

But Aparārka[5] on Yājñ.II.262, offers the following comment which agrees with Manu and the latter's commentators:

> paṇyavikrayī paṇyaparimāṇam śulkahānaye mithyā vadaṅśulkagrahaṇasthānāccāpākrāmanvaṇikśulkādaṣṭa-guṇam daṇḍyaḥ/
> yaśca savyājau śaulkikapratāraṇavantau krayavikra-yau karoti sauapi śulkādaṣṭaguṇam daṇḍyaḥ /

That is, a trader who sells his goods and declares, for the purpose of avoiding tolls, a false quantity of goods; or passes by the toll-office (without paying tolls), should be fined eight-times the amount of the toll. Also, he who sells or buys fraudulently and (with the intention of) evading śulka, (toll), should be made to pay eight times the amount of śulka as a fine.

Moreover, while commenting, in this context, upon Nārada (below), śulkasthānaṃ ... dāpyoaṣṭaguṇamatyayam /, Aparārka appears to understand by the word atyayam, 'a fine due to the transgression'. Thus, atyayo atikramanimitto daṇḍaḥ /

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1. Vide V.N.Mandlik, trans., (Bom.,188o), p.239; but vide J.R.Gharpure's trans., it is not clear whether the payment is eight-times the value of the commodity or otherwise; see, J.R.Gharpure, Yājñavalkya Smṛti with Mitā kṣarā, (Bom., 192o), p.378; also G.Jha, the Vivādacintamaṇi, cit.above, p.12o.
2. J.R.Gharpure, cited above, p.142; N.S.Kiste, ed., YājñavalkyaSmṛti, (Benares, 193o), p.715;
3. J.R.Gharpure, cited above, p.378;
4. N.S.Kiste, op.cit., p.715.
5. H.N.Apte, ed., Aparārka on Yājñavalkya Smṛti, A.S.S.46, pt.II, (Poona,19o4 p.834.

According to Bṛhaspati, "Those (companions in trade) who conspire to cheat the king of the share due to him (of their profit), shall be compelled to pay eight times as much, and shall be punished if they take to flight."[1] Further, probably in support of his statement, he goes on to emphasize why the payment of tolls is important:

> śulkasthānam vaṇik prāptaḥ śulkam dadyādyathocitam /
> na tadvyabhicare-drājñyām baliśeṣa prakīrtitaḥ / [2]

"A trader, who has approached a toll-office, must pay due toll. It should not be evaded, because it is said that the śulka is an offering, bali, due to the king." By implication, therefore, its evasion is a sin.

But Viṣṇu's remedy in this regard appears to be more severe than the others when he says,

> śulkasthānāda-pākrāman sarvāpahāramāpnuyāt/[3]

"Any (seller or buyer) who (fraudulently) avoids a toll-house (situated on his road) shall lose all his goods."[4]

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1. J.Jolly, trans., S.B.E.33, cit.above, p.349. According to the trans. of H.T.Colebrooke, however, there is no mention of 'companions in trade'; see Jagannātha's Digest, vol.II, (1801), p.301.

2. K.V.Rangaswami Aiyanghar, reconstruction & ed., Bṛhaspatismṛti (Baroda, 1941), p.131; Aparārka on Yāj̃ñ.II.262, cit.above, p. 834. Cf. Nārada, IV.12, which is almost similar, positively state that this means 'it is necessary to pay taxes to the king, because it (śulka) is (as if an offering to the God) king's share.' See Dharmakośa, cit.above, vol.I, pt.II, p.783; Nāradīyamanusamhitā with the Bhāṣya of Bhavaswāmi, Tri.S.S., No.47 (Tri., 1929), p.83. Bhavaswāmi is excellent: the śulka, according to him is the king's share and therefore, it is a sin to fail to pay it. Also, J.Jolly, trans., S.B.E.33, p.126, f.n.12: 'A duty is king's due and traders must not defraud the king of it.'

3. Viṣṇu, III.31, vide The Adyar Library Series, vol.No.93, Viṣṇusmṛti with the Commentary of Nanda Pandita, vol.I, (Mad., 1964), p.43.

4. Vide the trans. of J.Jolly, S.B.E. vol.7, (Oxford, 1880), p.16. Cf. G.Jha, 'One who evades the custom-house should suffer the confiscation of his entire stock'; see his trans. of Vivādacintāmaṇi, cit.above, p.120.

According to the gloss of Nanda-paṇḍita[1], however, this rule seems to apply to goods, dealing in which the king has either prohibited or has reserved for himself. The Vivādacintāmaṇi[2], on the other hand, says that this rule applies to cases of repeated offence.

Nārada seems to advocate an identical view to that of Bṛhaspati (see above p.108).

Besides, he says,

> śulkasthānam pariharannakāle krayavikrayī /
> mithyoktvā ca parimāṇam dāpyoaṣṭaguṇamatyayam //[3]
>
> "If he evades a toll-house, or if he buys or sells at other than the legal hour, or if he does not state the value (of his goods) correctly, he shall be fined eight times the amount which he tried to evade." [4]

This view seems to tie up with what we saw above (see pp.105-106) in Manu. Bhavasvami[5], apparently, treats this penalty (eight times the amount evaded) as a fine when he glosses, dāpya śulkādaṣṭaguṇaṃ-daṇḍam /. But his gloss on the word mithyokti is excellent:

> adhikavacane na doṣaḥ / yadyapyadhikavacanena mithyoktiḥ / tathāpi rājabhāvyasthānapahārāt / svārthahāneśca na chalam grāhyam /

What he means is this, 'an over-estimate (of goods) (by itself) is no offence, even if it is technically (according to the definition of the word mithyā) false; because it does not affect (diminish) the king's due share. One does not presume fraud when the act tends to be actor's personal loss.' This explanation greatly helps us to clarify what the śāstrakāras meant by this rule. In short, the act on the trader's part must be deliberate and intended to defraud the king of his lawful due or share.

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1. Ibid.
2. Ibid.; also see Jha's Hindu Law in its Sources, vol.I, (All., 1930), p.429. His note here reads: 'the penalty here laid down is for repeated evasions; and that laid down in the preceding sections (i.e.Yājñ.II.262) & Manu, VIII.400) is for the first offence.
3. Dharmakośa, Vyavahāra-kāṇḍa, vol.I, pt.2, op.cit., p.784; Nārada, IV.13, Nāradīyamanusaṁhitā, cit.above, p.87.
4. J.Jolly, cited above, p.126 (also see f.n.2 on p.108).
5. Nāradīyamanusaṁhitā, cit. above, p.87.

According to the Kauṭilīya Arthaśāstra,

> dhvajamūlamatikrāntānām cākṛtaśulkānām
> śulkādaṣṭaguṇo daṇḍaḥ / 1

"And, for goods that have passed beyond the foot of the flag without the duty being paid, the fine is eight times the duty."[2] It may be noted here that unlike the smṛtis referred to above, but like a few commentators upon them, Kauṭilya regards the eight times penalty as a fine, daṇḍaḥ. Again, this rule seems to apply to only one offence (or wrong) of by-passing the flag-post (toll-point); for, unlike the smṛtis again, he appears to regard such wrongs as making false declarations in order to defraud the customs duty as a crime of theft,[3] and prescribes punishment accordingly; while for the trader, on the other hand, who tries to cheat the toll-collectors by concealing the real value of his goods, but swears that he is telling the truth, the highest fine for violence is stated.[4]

Also, there are certain closely analogous rules which throw some light on this subject. For example, Vyāsa says,

> agopayanto bhāṇḍāni śulkam dadyuśca te adhvani /
> anyathā dviguṇam dāpyāḥ śulkasthānādvahiḥ sthitāḥ // [5]
>
> "Without concealing the goods, they must pay the due tolls on the road, otherwise they must pay up double the amount as evaders of the toll-house."
> (Or, they, those who have gone beyond the toll-office should be made to pay double).[6]

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1. Kauṭ., 2.21.16; R.P.Kangle, ed., The Kauṭilīya Arthaśāstra, pt.I, cit.above, p.73.
2. Ibid., trans., pt.II, p.164
3. Kauṭ., 2.21.19, ibid.; cf. "Thieves are of two kinds 'open' and 'secret'. Among 'open' thieves are traders and others; ... in this regard Vyāsa says, 'traders rob people etc.'; see G.Jha, trans., Vivādacintāmaṇi, cit.above, p.118. It may be noted here that both Kauṭilya and Vyāsa seem to have identical views.
4. Kauṭ., 2.21.21; Ibid.
5. Vyāsa, quoted in Dharmakośa, cit.above, p.789.
6. Cf. the Smṛticandrikā, trans. by J.R.Gharpure, cit.above, p.351.

It appears that this double penalty is restricted to merely by-passing the toll-house.

Vasiṣṭha, on the other hand, lays down the rule:

akaraḥ śrotriyo rājā[1]--- / bāhubhyāṃtaran
śataguṇam dāpyaḥ //

After stating those who are exempted from kara (toll), he says, "He who crosses a river with (the help of his) two arms (swims), should pay a hundred times." G.Bühler would prefer, however, to understand this as 'he who swims with his arms (across a river, in order to escape payment of toll at a ferry) shall pay one hundred times (the amount due).' Mahāmahopādhyāya K.K.Smṛtitīrtha appears to agree with G.Bühler. The principle underlying the punishment, according to him, is to be sought for in the consequent diminution of the revenue.[2] But, why should it be so high only in this context? Unless there are some special considerations, it appears to be highly oppressive and undhārmic; more like a fine for an offence than compensation for a wrong.

We know that there is no mention here of the swimmer carrying any merchandise or valuable goods across the river. The basis of the charge or toll, therefore, amounts to no more than the privilege of crossing a river, perhaps by a state-owned ferry, and hence may mean a fare; but even then the hundred times payment, simply because one swims across 'a river', sounds ridiculous.

Perhaps the rule applied not to 'a river' but to 'a particular river', the crossing of which must have had some particular importance attached to it, due to which Vasiṣṭha thought it fit to sanction a hundred times penalty, or it might be a river representing a border between two states, where śulka or an entry-kara had to be paid for the privilege of crossing the river, i.e., entering a particular (or foreign) territory.

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1. Vasiṣṭha, XIX.16, quoted in the Dharmakośa, cop.cit., p.1944. This verse is numbered XIX.16.25 in the trans. by G.Bühler, S.B.E.14, cit.above, p.98 or 99 (according to some copies)
2. Vardhamāna's Daṇḍaviveka, cit.above, see its introduction, p.XXIII.

In this case swimming across the river might well be a crime or something akin to it. In this case it is a question of frontier control.

akāle atīrthe ca taratah pūrvah sāhasadandah /[1]

"For one crossing out of time or elsewhere than at the crossing, (the punishment shall be) the lowest fine for violence."[2] *

Moreover, Kautilya, in the same context, prescribes a comparatively heavy penalty (atyaya)[3] for him who crosses even at the proper time and at the crossing but without the authority;[4] and in the following verse,[5] where he is laying down exceptions to the rule (of paying tolls), he mentions 'envoy's followers' (sambhāvyadūtānupātinām /) as one of these exceptions. Thus, in view of the above, our suggestion that this rule of Vasistha applies to the crossings of a border-river appears sensible and may tentatively be accepted.

To sum up our discussion, it may be stated that
a) none of the smrtis have used the word danda in these verses on the subject; instead the words atyayam and dāpya are used;
b) the arthaśāstra has, however, used the word danda; and
c) it appears from the interpretations of various commentators that they have understood these words atyayam and dapya as meaning either a fine or a penalty; thus, there is no one opinion among the commentators on this point. It is quite clear, however, that
d) all the śāstrakāras seem to agree that the sorts of unpaid tolls intended to qualify for the exception are those which have reference to intentionally fraudulent or dishonest behaviour in order to defeat the king's claim to the tolls on the part

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1. Kaut., 2.28.15; pt.I, cit.above, p.83.
2. Kaut., 2.28.15; pt.II, cit.above, p.187.
3. Kangle's gloss on Kaut.,2.6.1o, ibid., p.88, f.n.1o; here he says, "atyayah: - This would ordinarily include danda. But in 2.12.35, both are separately mentioned. Perhaps, there atyaya is restricted to penalty for violation of state regulations, while danda is a fine imposed by judges and magistrates only.
4. Kaut.2.28.16, ibid., "For one who crosses without authority even at the proper time and at the crossing, the penalty for crossing is twenty six panas and three quarters." This is very specific!
5. Ibid., pp.187-188 and f.n.17 thereon.

* L.Rocher has given reasons for thinking that the original meaning of sāhasa related to fines.

of the toll-evader concerned; and that
e) there appears to be no clear-cut demarcation, either in the smṛtis or in the artaśāstra, as to where the civil liability ends and the criminal liability begins so far as this subject is concerned; in these cases, civil wrong and crime are difficult to distinguish. Lastly,
f) the attitude of the arthaśāstra towards the wrong-doer, so far as toll-evasion is concerned, is more severe as compared with that of the dharmaśāstra. This is not surprising as the former was written solely from the standpoint of a royal administrator.

Thus, the 'śulka' liability, incurred by reason of toll-evasion, has some reference to unrighteous behaviour on the part of the evader. Moreover, the liability is one which seems to have been provided for by administrative decree, and appears to be closely analogous to modern excise rules, under which one who attempts to evade customs duty becomes liable to pay, on conviction a multiple of the duty. This is not a fine, properly so called!

II.6 SUMMARY

There is no doubt but that what is meant is that where the king's right to the toll has been defeated by the merchant's evading the custom-post, which is in any case a sin, the amount payable (eight times, etc.), though analogous to a fine, is not precisely a fine and therefore deserves to be mentioned separately from fines.

Now, one would suppose that unpaid fines and unpaid tolls are debts. In the first case they are due to crime and in the second they are mostly due to evasion of duty (but in some cases they might be due to the combination of both crime as well as evasion of duty, as appears in the case of Vasiṣṭha's rule discussed above, see pp. 111, 112. Such evasion of duty is akin to crime, and therefore the soul of the offender would be better off if the amounts were paid. But this is, perhaps, subsidising the king's income at the son's expense - and each

offender must pay for his own guilt.[1] Therefore these two debts are exempted according to 'dharma', hence are equally non-exigible from sons.

The dharmaśāstra, as we find it, is already in an advanced stage of development. We cannot tell which considerations might have decided, in the remoter past, what policy should be adopted towards royal rights. The theoretical subordination of the king and his powers (and this includes his 'income') to the rule of dharma was already complete before our smṛtis were compiled in their present form. To the smṛtikāras the king was a necessary expedient, but not more than an expedient. To claim, as a matter of dharma (as opposed to secular policy), the payment of fines, and claims analogous to fines, from persons other than the offender may well have suggested supersensory pretentions which the śāstris were never able, it seems, fully to comprehend or allow. What happened in practice was that vicarious[2] punishment took place, irregularly and de facto as an additional deterrent. The dharmaśāstra never countenanced this, and only mentioned it by the way. We cannot at present confirm that this was indeed the regular sequence of thought in remote and undocumented times, but this suspicion must at least be noted here.

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1. Medhātīthi on Manu, X.91; 'the results of good and bad acts always accrue to the man who does them'; vide G.Jha, trans., cit.above, vol.V, pp.315-316.

2. J.D.M.Derrett, R.L.S.I., cit.above, pp.215-216.

CHAPTER III

DEBTS DUE TO GAMBLING, SPIRITUOUS LIQUOR, FUTILE GIFTS, LUST OR ANGER

III.1 GENERAL

Generally, from the point of view of both the dharmaśāstra[1] and arthaśāstra,[2] the son's liability to pay his father's debts does not extend to debts which are incurred by him (the father) for the purpose of gambling, spirituous liquor, or futile gifts or debts due to lust or wrath. Our purpose is, therefore, to investigate here why the śāstras exclude these debts of the father from the liability of his sons to pay. For the purpose of clear understanding of the problem, we begin with the presentation of the views of the śāstrakāras; we shall then illustrate them with the help of their commentators', and, later, digest-writers', comments and explanations.

III.2 THE ŚĀSTRAKĀRAS' VIEWS

Thus, while laying down the exception to the general rule in respect of sons' liability to pay their father's debt, Gautama enumerates, madya - dyūta[3] i.e. 'debts contracted for spirituous liquor or in gambling.'[4] Kauṭilya lists 'ākṣikam - saurikam - kāma-dānam'[5] which mean 'gambling debts or debts due to liquor or debts due to lust';[6] the last category being in addition to what Gautama has mentioned in his list.

Vasiṣṭha[7] and Manu,[8] on the other hand, mention vṛthādānam,

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1. Gautama, XII.41; Vasiṣṭha, XVI.31; Manu, VIII.159; Yājñ. II.47; Bṛhaspati, XI.51; Vṛdhahārita, VII.249; Nārada, IV.1o, see above pp.6o-63.
2. Kauṭilya, 3.16.9, see above p.65.
3. Gautama, 12.38; q. the Dharmakośa, cit.above, vol.I, pt.2, p.677.
4. G.Bühler, trans., Gautama, S.B.E.2, cit.above, p.241, (here this verse is numbered XII.41).
5. Kauṭilya, 3.16.9; R.P.Kangle, ed., cit.above, pt.I, p.122; Dharmakośa, op.cit., p.68o.
6. G.Jha, H.L.S., cit.above, pt.1, p.2o7 (Jha seems to have omitted 'suretyship debts' from his translation); R.P.Kangle, trans., op. cit., pt.2, p.281, translates kāma-dāna as 'gift of love'. It may be suggested here that in this context Jha's rendering seems correct.
7. Vasiṣṭha, 16.26; the Dharmakośa, op.cit., p.678.
8. Manu, VIII.159.

ākṣikam and saurikam[1] i.e. 'anything idly promised, money due for losses at play or for spirituous liquor'.[2] They have introduced, it may be noted, a new category, namely, vṛthādānam (which may also mean 'a futile gift'[3]); but at the same time they have left out kāma-dānam which appears in the enumeration of Kauṭilya. Yājñavalkya's list includes all the four categories, i.e., surā-kāma-dyūta-kṛtam ... vṛthādānam[4] the meaning of which is, 'that which was contracted for the purposes of spirituous liquor, lust or gambling ... as also a gift without any consideration'[5] ... . Vṛddha-hārīta has a similar provision.[6] Bṛhaspati's enumeration includes an additional category of debt that the son need not pay. According to him, saurākṣikam-vṛthādānam-kāma-krodha-pratiśrutam / ... putrān na dāpayet //'[7], which, according to J.Jolly, means, 'Sons shall not be made to pay (a debt incurred by their father) for spirituous liquor, for losses at play, for idle gifts, for promises made under the influence of love or wrath[8] ... '. However, it may be pointed out here that the correct translation of the term kāma in this context

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1. Prātibhāvyaṁvṛthādānam-ākṣikam-saurikam ca yat / ... na putro dātumarhati // ibid., vide Mānavadharmaśāstra, V.N.Mandlik, ed., op.cit., p.975; Dharmakośa, op.cit., p.663; P.D.Vidyalankara, ed., The Vivāda-ratnākara, (Calcutta, 1887) p.57.
2. Vasiṣṭha, 16.31; G.Bühler, trans., S.B.E.14, cit.above, p.82.
3. Vide G.Jha, trans., Manusmṛti, vol.IV, pt.I, (Calcutta,1924), p.201; (cf. f.n.5 below).
4. Yājñavalkya, II.47; B.S.Moghe, ed. & trans., Yājñavalkya-smṛti, Vyavahārādhyāya, cit.above, p.102; Dharmakośa, op.cit. p.685.
5. Yājñavalkya, II.47; vide J.R.Gharpure, trans., Yājñavalkya-smṛti, cit.above, p.786.
6. Surā-kāma-dhyūtakṛtam vṛthādānan --- ca / daṇḍa --- putro dadhyānna paitṛkam // Vṛddhahārīta, 7.249; vide Dharmakośa, op.cit., p.715.
7. Bṛhaspati q. in Dharmakośa, ibid., p.708; The Vivāda-ratnākara, op.cit., p.57.
8. Bṛhaspati, 11.51; J.Jolly, trans., S.B.E.33, cit.above, p.329 cf. J.R.Gharpure, trans., The Vīramitrodaya, op.cit., p.787, where he translates the same term "a promise made under amorous influence, or in wrath".

should, it seems, be 'lust'[1] and not 'love'.

Nārada[2] has all these categories except vṛthādāna. Kātyāyana, though he seems aware of various other tainted (sadoṣam) debts,[3] has mentioned, by way of explanation, only two of the categories mentioned by Bṛhaspati, i.e., kāma-kṛtam[4] and krodha-kṛtam[5] debts.

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1. Even Jolly, op.cit., appears to agree with this meaning, for he draws our attention (see f.n.51 on p.329) to Kātyāyana's explanation regarding the meaning of this term. P.V.Kane, ed.& trans., Kātyāyanasmṛti, at p.234, translates Kātyāyana's explanation, (verse 564) as "(what was promised) to the wife of another should be known as a debt due to lust." Also, J.R.Gharpure, trans., The Smṛticandrikā, cit.above, p.319; here the term kāmakrodhapratiśrutam in Bṛ.XI.51, is translated as 'for promises made under the influence of lust or wrath'. G.Jha, trans., The Vivādacintāmaṇi, cit.above, at p.29 seems to agree with this. There he translates this term, 'gifts promised through lust or anger'.

2. Kāma-krodha-surā-dhyūta ... kṛtam vinā /
Nārada, IV.1o; vide Dharmakośa, op.cit., p.695.

3. Yad ... tu tat /
sadoṣam vyāhatam pitrā naiva deyamṛṇam kvacit //
Kātyā., 554; vide P.V.Kane, op.cit., p.69. According to Kane sadoṣam means 'tainted'. And in f.n.554 (at p.228) he says that a "debt is tainted when it is incurred for liquor, lust or gambling .... etc."

4. Likhitam .... pratiśrutam / parapūrvastrīyai yattu ...
kāma-kṛtam nṛṇām //
Kātyā., 564, P.V.Kane, ibid., p.71;
also see f.n.1 above.

5. Yatra ... vināśya va / Uktam ... vidhyāt krodha-kṛtam ... //
Kātyā., 565; P.V.Kane, ibid.

It is clear from the above statement that, of the śāstra-kāras referred to, all except Kātyāyana have mentioned the 'debts due to spirituous liquor and gambling'. Kauṭilya, Yājñavalkya, Bṛhaspati, Nārada, Kātyāyana and Vṛddha-hārīta have referred to 'debts due to (or under the influence of) lust'. Whereas Vasiṣṭha, Manu, Yājñavalkya, Bṛhaspati and Vṛddha-hārīta have listed 'debts due for futile gifts', Bṛhaspati, Nārada and Kātyāyana have mentioned 'the debts incurred under the influence of wrath'. Thus, of all the five categories of debts under consideration, Gautama refers to only two kinds, namely madya and dyūta, which are missing from Kātyāyana's list and vice versa. Only Bṛhaspati has enumerated all the five categories; but the rest, as shown above, have laid down various combinations. Evidently, therefore, there appears to be no uniformity amongst the śāstrakāras so far as the number as well as the kind of debts forming the exceptions are concerned. One wonders why?

Does it mean, for example, that the debts mentioned by Gautama, i.e. debts due to spirituous liquor or for gambling, which are not found, by name, in Kātyāyana's list, were no longer considered during Kātyāyana's period as forming part of the exception? Perhaps not; firstly because, besides the debts due to lust or anger, Kātyāyana does refer to sadoṣa debts, which, it is suggested, may represent other immoral or illegal debts (see f.n.3 above). Moreoever, even if we do not find it in Gautama XII.38 (or 41), the Mitākṣarā on Yājñavalkya, II.47[1] does seem to attribute to him (Gautama) the term kāma, meaning thereby that according to Gautama "(money due from a father on account of) a debt incurred for spirituous liquor, ..., or in gambling, or for amorous pleasures ... shall not involve a son."[2] Thus, in the absence of any positive evidence to the effect that the categories of debts which are not found in Kātyāyana's (or for that matter, any other's) list, were not considered as excepted from the son's liability to pay, it might be an untenable suggestion on our part. This is, however, beside the point.

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1. Gautamenāpyuktam / madyaśulkadyūtakāmadaṇḍān -- //
vide B.S.Moghe, op.cit., p.102; Dharmakośa, op.cit., p.677, f.n.1.
2. J.R.Gharpure, trans., op.cit., pp.786-787.

What we really want to know is the basis behind the inclusion of these debts of the father within the 'illegal or immoral' category. We may proceed with this enquiry from now onwards, for the sake of convenience, by treating these five debt categories, one by one.

[II.3 GAMBLING DEBTS

We are told[1] that gambling is one of the most ancient vices of men. Undoubtedly, there are numerous references to gambling in the vedas.[2] We find the most vivid and convincing description of a gambler's lament in the Ṛgveda, X.34.1-15.[3] It is stated there (in verse 13), "Play not with dice: no, cultivate thy corn-land. Enjoy the grain, and deem that wealth sufficient. There are thy cattle, there thy wife, gambler." Thus, the gambler is advised to rely upon earned wealth and not to resort to gambling for it. According to the Mahābhārata (Udyogaparva, 37.19) too, "Gambling from the early ages has been seen to be the cause of enmity among men; therefore, it should not be resorted to even in jests by the

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1. P.V.Kane, Kātyāyanasmṛti, cited above, p.329, f.n.933.

2. 'Not our own will betrayed us, but ... wine, dice or anger.' Ṛg., VII.86.6; vide R.T.H.Griffith, trans., The hymns of the Ṛgveda, vol.III, (Benares, 1891), p.106. Also Ṛg.I.41.9, ibid., vol.I, (Benares, 1889), p.76, f.n.9. There appears to be difference of opinion between Wilson, Benfey and Ludwig as to the exact import of this verse. But clearest and most vivid description in this regard is available in Ṛg.X.34.1-14; ibid., vol.IV, (Benares, 1892), pp.169-171.

3. Ibid.. Especially, verses 2-12 at pp.170-171 show how the gambler has lost, due to addiction to gambling, his wife, parents, other relatives and all wealth, and became an object of hatred.

   'The gambler's wife is left forlorn and wretched: the mother mourns the son who wanders homeless. In constant fear, in debt, and seeking riches, he goes by night unto the home of others.' (per verse 10).

wise."[1] The fact is, however, that in spite of these advices and warnings, gambling lived on and is still present. Āpastaṃba (II.1o.25.12-13)[2] refers to a certain setting of the gambling house and says, "Men of the first three castes, who are pure and truthful, may be allowed to play there." Thus, gambling seems to be as old as the śāstras. It is treated at great length by the śāstrakāras[3] and others[4], but our enquiry relates primarily to its nature: what is meant by gambling and why should it be classified as an evil or a vice?

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1. M.N.Dutt, ed.& trans., Mahābhārata, vol.I, (Calcutta, 1896), p.56;
   Also,
   dyūtam-etatpurākalpe --- nṛṇām /
   tasmād dyūtam na seveta hāsyārthamapi budhimān //'
   vide S.K.De, ed., B.O.R.I., vol.6, (Poona, 194o), p.169, f.n.17; Cf. Manu, IX.227 which is almost identical.
   Vide G.Bühler, trans., S.B.E.25, cit.above, p.381; G.Jha, trans., cit.above, vo.V, p.183.
   On gambling as a vice see Kauṭ.8.3.41-61, R.P.Kangle, trans., The Kauṭilīya Arthaśāstra, II, cit.above, pp.395-396; cf., J.D.M. Derrett, trans., Bhāruci's Commentary on the Manusmṛti, II, cit.above, pp.47-48.

2. Vide G.Bühler, trans., S.B.E.2, cit.above, pp.16o-161.

3. Manu, IX.221-228, G.Jha, op.cit., vol.V, (Calcutta, 1926), pp.182-183; Kauṭilya, 3.2o.1-13, R.P.Kangle, pt.2, op.cit., pp.29o-291; Yājñ.II.199-2o3, vide Aparārka on Yājñ., A.S.S. vol.46, cit.above, pp.8o2-8o5; Bṛhaspati, XXVI.1-9; J.Jolly, trans., S.B.E.33, cit.above, pp.385-386; Nārada, XVII.1-8, J.Jolly, trans., op.cit., pp.212-213; Kātyāyana, 933-943, P.V.Kane, ed.& trans., cit.above, 329-332; cr text at pp.113-114.

4. The Vivādaratnākara, cit.above, pp.61o-618; The Smṛti-candrika, trans., op.cit., pp.5oo-5o2; The Vivādacintāmaṇi, cit.above, pp.315-316, (Jha's trans.); Pārāśara-mādhava, C.Tarkalankara, ed., vol.3, (Calcutta, 1899), pp.388-393; The Vyavahāra-Bālambhaṭṭi, N.P.Parvatiya, ed., cit.above, p.88o;
   The Vīramitrodaya, Rājanīti prakāśa, V.Prasad, ed., (Benares, 1916), pp.152-153; G.Jha, H.L.S., cit.above, pp.549-557. Dharmakośa, vol.I, pt.3, op.cit., pp.1893-1915.
   Also see, Hemacandra, Arhannīti, cit.above, p.95, verse 5o:

   surā-kaitava-dyūtārtham para-strī-hetukam tathā /
   ṛṇam pitṛ-kṛtam putro deyān naivakadācana //

According to Manu (IX.223),[1] gambling is "That which is done through inanimate things," while "what is done through animate things is betting."[2] Nārada's[3] definition reads, "Gambling is artful playing with dice, --- and such other things.[4] Betting consists in sporting with birds (and other animals)."[5] Neither of these definitions appears to clarify the purpose of gambling or betting, however, Bṛhaspati[6] explains, "When birds, rams, bulls or other animals are made to fight against one another, after a wager has been laid on them, it is called 'betting'."[7] Perhaps a better exposition appears in the Vīramitrodaya (Rājanīti-Prakāśa, p.153).[8] There the gloss on Manu, IX.223 runs as follows: Aprāṇibhiḥ means with dice, tablets and so forth; prāṇibhiḥ means with rams, cocks and other animals. Gambling and prize-fighting are names applicable to only such acts as are accompanied by betting; where there is no betting, the act is called 'sport' and not deprecated among people.[9] Thus, what appears to be objectionable is placing a wager or betting and not 'sport'. Why?

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1. aprāṇibhiryat kriyate talloke dyūtamucyate / prāṇibhiḥ kriyate yastu vijñeyaḥ sa samāhvayaḥ // vide G.Jha, H.L.S., cit.above, p.549; The Vīramitrodaya, cit.above, p.152; The Parāśara-mādhava, cit.above, p.388; Aparārka on Yājñ., cit.above, p.8o2; The Vivāda-ratnākara, cit.above, p.61o.
2. G.Jha, H.L.S., op.cit., p.549; also see his trans. of Medh.on Manu, cit.above, vol.V, p.182.
3. akṣabandhaśalākādyairdevanam jihmakāritam / paṇakrīḍā vayobhiśca // Nār.XVII.1, vide G.Jha, H.L.S., op.cit., p.549; Parāśara-mādhava, op.cit., p.388; The Vivāda-ratnākara, op.cit.,p.61o.
4. Also, see Manu q.by Aparārka on Yājñ., op.cit., p.8o2, where he names six impements of gambling.
5. G.Jha, H.L.S., op.cit., p.549; cf. J.Jolly's trans.S.B.E.33, op.cit., p.212. For the difference, see explanation in f.n.XVII.1 at p.212. Jha seems to follow Jolly in his Comparatve Notes, pt.III, (Calcutta, 1929), p.777 on Manu, IX.223.
6. anyonyam parigṛhītāḥ pakṣimeṣamṛgādayaḥ/ praharante kṛtapaṇāstam vadanti samāhvayam // Bṛ., XXVI.3, G.Jha,H.L.S., op.cit., p.549; The Vivāda-ratnākara, op.cit., p.61o; the verse, it may be noted, is differently composed by Mādhavācārya, see Parāśara-mādhava, op.cit., p.389.
7. G.Jha, H.L.S., op.cit., p.549; J.Jolly, op.cit., p.385.
8. Aprāṇibhiḥ,- akṣaśalākādibhiḥ / Prāṇibhiḥ, - meṣakukkutādibhiḥ / tatrāpi paṇapūrvam yatkriyate tadeva dyūtam samāhvayaśca / apaṇapūrvake tu na dyūtasamāhvayaśabdau pravarttete / loke tayoḥ krīdāśabdenaiva vyavahārāt / ata eva tayorloke vigānābhāvaḥ / supra. (f.n.contd.)

Now, we have noticed above (see pp. 119-120) that gambling for the purpose of accumulating wealth existed even during very early ages, and people were aware of its evil consequences which have been expressed very clearly. Later on, by the time of Āpastaṃba (see f.n.2 above p.121), however, gambling appears to have been subjected to certain ritualistic and other rules and regulations,[1] perhaps due to a desire for minimising its bad effects upon society. Also, there appear to be provisions to collect taxes on gambling and for punishment by the king of those gamblers who either played other than in the approved places or quarrelled in the assembly (gambling)-house.[2] Moreover, Āpastaṃba, II.1o.25.13 read with the comments[3] of Haradatta, seems to suggest that gambling, unless played by honest men, was open to disputes and quarrels, perhaps due to fraudulent behaviour on the part of the gamblers. This view appears to have been supported even by Kauṭilya[4] when he says, "Gamblers indeed are generally fraudulent players."[5] Even if this was so, gambling was not outlawed. On the contrary, from the discussion so far, it seems quite

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f.n. continued from last page)

9. G.Jha, Manusmṛti-Notes, (Explanatory) pt.II,(Cal.,1924), p.749; cf. R.P.Kangle, trans., pt.II, cit.above, p.291, f.n.13. Here, Kangle glosses, 'challenges with bets concerning learning, or skill in art, are not subject to state control and may be freely indulged in.'

1. Āpastamba, II.1o.25.12, "In the midst of the assembly-house (the superintendent of the house) shall raise a play-table and sprinkle it with water --- and place on it dice --- , as many as are wanted." Vide G.Bühler, trans., cit.above, p.16o.

2. 'Having played there, they shall give a fixed sum to the gambling-house keeper and go away. The latter shall --- give that gain to the king. And the king shall punish those who play elsewhere or quarrel in the assembly-house.' Haradatta on Āpastaṃba, II.1o.25.13; see ibid., p.161,f.n.13.

3. Ibid.

4. Prāyaśo hi kitavāḥ kūtadevinaḥ / Kauṭ.3.2o.7, vide R.P.Kangle, ed., pt.I, cit.above, p.127.

5. Ibid., trans., pt.II, cit.above, p.291.

clear that both the dharmaśāstra and arthaśāstra approve, if not encourage, gambling in a certain regulated form. The justification for the approval is evidently based on two main grounds: (a) to yield revenue[1] to the king and, (b) to help detection of thieves[2] or men of secret professions,[3] or men of bad livelihood.[4] In view of the evil effects of gambling on the society as a whole, one wonders whether these grounds are sufficiently justifiable for approving of gambling. Could it be because of this that Manu has so forcefully deprecated both gambling and betting?

Manu states,[5]

> "The king shall exclude from his kingdom all gambling and betting. Gambling and betting are open theft, and should be suppressed --- He who either does the gambling or the betting, or helps others to do it, --- all these the king shall strike. --- If a man has recourse, either openly or secretly, to this vice, the form of punishment inflicted upon him shall be in accordance with the king's discretion." [6]

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1. Sa samyak pālito dadyāt rājñe bhāgaṁ yathākṛtam / jitamudvāhayejjetre dadyātsatyam vacaḥ kṣamī // Yājñ.II.2oo
Athavā kitavo rājñe dattvā bhāgam yathoditam / prakāśadevanam kuryāt // Nārada, XVII.8
both vide here G.Jha, H.L.S., cit.above, p.552;
also, see f.n.2 on p.123 above.
"If it (gambling) has to remain (has to be allowed) he (the king) should allow it to be done openly -- and he should make it yield revenue (tax)." Kātyā.935, vide P.V.Kane, cit.above, p.33o; cf.verse 939 on p.331.

2. Dyūtam ekamukham kāryam taskarajñānakāraṇāt // Yājñ.,II.2o3 vide G.Jha, H.L.S., op.cit., p.551.

3. Kauṭ.3.2o.2 as translated by Kangle, pt.II, op.cit., p.29o.

4. "The superintendent of gambling shall have gambling carried out at one place, for the purpose of detecting men of bad livelihood." Kauṭ. 3.2o.1-2, per G.Jha, H.L.S., cit.above, p.551 (notes). It may be pointed out here that Kangle's translation of gūḍhājīvijñāpanārtham (as per f.n.3) seems correct.

5. Dyūtam samāhvayam caiva rājā rāṣṭrān nivārayet / --- tasya daṇḍavikalpaḥ syāt yatheṣṭam nṛpatestathā // Manu, IX.221-228;
vide The Vīramitrodaya, Rājanīti prakāśa, cit.above, pp.152-153
also, G.Jha, H.L.S., cit.above, p.55o. *

6. G.Jha, ibid.

* It may be noted here that Bhāruci on Manu IX.224 takes the political aspect as significant, not dhārmic. See J.D.M.Derrett, trans., vol.II, cit. above, p.267.

Thus, to him (Manu) these two are evils (or vices) too serious to be allowed to continue in the society. So are the gamblers: men addicted to this evil deed and, as such, a threat to the well-behaved people in the king's realm. It is for this reason that, in his view, the king should instantly banish or strike them all.

Bṛhaspati[1] refers to this as well as other's views on the subject. According to him,

> "Gambling has been prohibited by Manu, because it destroys truth, honesty and wealth. It has been permitted by other (legislators) when conducted so as to allow the king a share (of every stake). It shall take place under the superintendence of keepers of gaming houses, as it serves the purpose of discovering thieves, ---."[2]

Thus, according to his understanding of Manu, gambling is destructive of moral values and the material well-being of people.

Kātyāyana's views,[3] in this respect, seem more revealing. He says,

> "One should not resort to gambling which inflames the passions and greed (of men), which engenders bad characters, which is cruel, and causes loss of wealth to men. Since strife is certain (to follow) from gambling just as poison (is sure to issue forth) from the mouth of a serpent, therefore the king should stop this vice in his country."[4]

Although, Kātyāyana, unlike Manu, seems to approve (see f.n. 1, p.124) of the continuance of gambling, provided it is undertaken openly and according to rules, under supervision, so as to yield revenue (tax), it appears almost certain that

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1. Dyūtam niṣidham manunā satyaśaucadhanāpaham / tat pravartitamanyaiśca rājabhāgasamanvitam // sabhikādhiṣṭitam kāryam taskarajñyāpakam hi tat // Bṛ.XXVI.1-2,
   vide G.Jha, ibid.,
2. Vide J.Jolly, cit.above, p.385.
3. Dyūtam naiva tu seveta krodhalobhavivardhakam / --- --- tasmādrājā nivarteta viṣaye vyasanam hi tat // Kātyā., 933-934,
   vide P.V.Kane, cit.above, p.113.
4. Ibid., pp.329-33o.

he considers gambling as a vice which the king should stop in his country.

This impression is gained because he very succinctly points out how men are turned into cruel characters due to the passions and greed inflamed by gambling which instils false hopes of winning fortunes. In the process, such men destroy their wealth, themselves, their families and society.

Even Yājñavalkya, though he has approved regulated gambling,[1] seems quite opposed to fraudulent[2] or secret gambling, for he says, "Those who play with false dice or cheat at play shall be branded and banished."[3]

In this regard, Kauṭilya appears to go as far as sanctioning a fine against such gamblers, not branding or banishment. Thus, he lays down that, "for fraudulent play the lowest fine for violence and confiscation of winnings, for cheating fine for theft in addition."[4] It is reasonably clear, therefore, that both the dharmaśāstra and arthaśāstra recognized the fact that gambling was associated more with fraud and deceit than honesty and truth.

This suggestion appears generally to be strengthened if we turn to the views of the commentators on the subject. Thus, the Mitākṣarā on Yājñ., II.2o3, explains that "Gamblers generally hail from those who amass wealth by theft."[5] Sarvajñanārāyaṇa, on Manu, IX.225, considers them (gamblers) 'men of exceedingly crooked behaviour'.[6] Kullūka, on

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1. Prāpte bhāge ca nṛpatiḥ prasiddhe dhūrtamaṇḍale / jitam sasabhike sthāne dāpayed anyathā na tu // Yājñ.II.2o1, vide, G.Jha, H.L.S., cit.above, p.553.
2. The fraudulent practices and cheating have been deprecated by almost all the śāstrakāras; see, Manu, IX.222, 226; vide, G.Bühler, cit.above, pp.38o-81; Bṛhaspati,XXVI.5&9, vide, J.Jolly, cit.above, p.386; Yājñ.II.2o2; G.Jha, H.L.S., op.cit., p.555; Nārada, XVII.1&6, vide, J.Jolly, op.cit., pp.212-13; Viṣnu, q. in The Vivāda-ratnākara, cit.above,p.617.
3. Rājñā sacihnaṃ nirvāsyāḥ kūṭākṣopadhi-devinaḥ // Yājñ.II.2o2, vide G.Jha, H.L.S., op.cit., p.555.
4. Kauṭ., 3.2o.9, vide, R.P.Kangle, trans., pt.II, cit.above, p.291.
5. Vide J.R.Gharpure, trans.,Yājñvalkya-smṛti, vol.II, cited above, p.341.
6. Vide G.Bühler, trans., op.cit., p.381, f.n.225.

Manu, IX.226, calls them 'secret thieves';[1] while to Sarvajñanārāyaṇa and Nandana gambling carries 'corrupt'[2] influence on others, i.e., non-gamblers in the society.

It may be concluded, therefore, that in view of the śāstras, gambling seems to be a vice or an evil, which is conducive of spreading immorality in the society by rousing virulent passions and greed in men, and hence destructive of both wealth and happiness. And, although most of the smṛtikāras appear to join Kauṭilya perhaps unwillingly in prescribing rules for the proper conduct of gambling, recognizing its inevitability due to weaknesses of human nature[3] (in respect of speculative gains) and in spite of Manu's strong condemnation, this basically unethical and destructive nature of gambling seems to be at the root of the rule that excludes gambling debts of the father from the son's liability to pay them.

Before concluding our discussion on the subject, we are thus led to consider a relatively minor though important point in respect of gambling debts - their scope. What kind of debts of the father did the śāstrakāras intend to include in this category, which the sons need not pay?

We have already referred to the śāstrakāras' terms enumerating this category (see above pp.116-120), and the renderings of these terms by the various modern scholars. But that alone does not seem to explain the exact scope of this category of debts. Let us, therefore, take help from the commentators and digest-writers to determine what those terms might mean.

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1. Ibid., f.n.226.
2. On Manu, IX.226, ibid. (for the text, reference may be made to V.N.Mandlik, ed., Mānava-dharmaśāstra, cit.above, p.123o.
3. For a similar view, see J.R.Gharpure, A General Introduction with special reference to Yājñvalkya-smṛti and the Mitākṣarā, (Bombay, 1944), p.172.

To one group[1] of commentators and digest-writers, the term (i.e., dyūtam or ākṣikam) means either a debt 'for gambling' or 'for the purpose of gambling'. This is, however, too vague. Another group[2] renders it, 'on account of a defeat in gambling'. According to Rāmachandra it seems to mean 'a debt contracted in connection with dice (or things used in gambling), i.e., perhaps for the purchase of dice, as well as in respect of gambling itself, i.e., for actual stake.[3] But Asahāya[4] on Nārada, IV.1o, renders it, 'due to uncontrollable habit (madness or addiction to) gambling'. A better exposition appears in Medhātīthi on Manu, VIII.159. He explains that, 'debts incurred in gambling are 'gambling debts', i.e., the amount that has been actually lost at play or the money that can be proved to have been borrowed for the purpose of gambling'.[5] One wonders, however, about what would be the position if the money proved to be borrowed for the purpose of gambling, has in fact been spent on, say, a religious purpose? However, a situation such as this would, one might argue, hardly arise. According to a suggestion of Jagannātha,[6] 'fine to the king, incurred by gaming with dice and any debt connected with such a fine' should be, so it appears, included into this category. Although there could be some relation between (the father's) gaming and a fine due to his gaming, in view of the independent category of debts due to fines, it may be pointed out here

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1. Dyūtanimittam ca ṛṇam, Maskaribhāṣya on Gautama, XII.38, vide, Dharmakośa, vol.I, pt.II, cit.above, p.678; dyūta-nimittaṁ Kullūka, ākṣikam dyūta-nimittam Rāghavānanda and Nandana on Manu, VIII.159, vide V.N.Mandlik, op.cit., p.975; The Vivāda-ratnākara, cit.above, p.57; The Vīramitrodaya on Yājñ., II.47, vide J.R.Gharpure, cit.ab. p.787; Śūlapāṇi on Yājñ., II.47, ibid., p.788.
2. Ākṣikam dyūta-hāritam, Sarvajñanārāyaṇa on Manu, VIII.159, vide, V.N.Mandlik, op.cit., p.975; dyūtasamāhvayābhyām yajjitaṁ pitrā, Govindarāja on Manu, VIII.159, vide Dharmakośa op.cit., p.663; dyūtahāritaṁ, Viśvarupa on Yājñ.,II.53, ibid., p.685; dyūte parājayanirvṛttam, the Mitā. on Yājñ., II.47, ibid; The Smṛticandrikā, vide, J.R.Gharpure, trans., cit.ab., p.319.
3. Ākṣikaṁ akṣasaṁbandhakṛtam dyūtakṛtam, Rāmchandra on Manu, VIII.159, vide, V.N.Mandlik, cit.above, p.975; cf.Jagannātha (on Manu CLI), "Lost at play", due in consequence of gaming. It consequently signifies any debt contracted for stake in playing with dice, or for the purchase of things used in gaming. - vide, H.T.Colebrooke, trans., Digest, I, cit.above, p.3o4. (footnotes continued)

that this suggestion appears to confuse the issue. A debt due to any fine, no matter how it is incurred, could hardly be categorised as a 'gambling debt'.

Thus, from the above discussion it appears that by gambling debt the śāstrakāras seem to mean any debt incurred by a habitual gambler (the father in this case) to meet actual losses at play with dice etc., or any legitimate expenses in connection therewith, but excluding fines due to gambling.

As we have already seen above (see p.127) why gambling has been deprecated by the śāstrakāras, we may turn to discuss the next category of debts: the debts due on account of spirituous liquor.

III.4 DEBTS DUE ON ACCOUNT OF SPIRITUOUS LIQUOR

We have already noted above (see pp.116-120) that almost all the śātrakāras have excepted the father's debts for spirituous liquor from the son's liability. Why? We should determine, too, as far as possible, the scope of the exception.

The drinking of spirituous liquor has usually been associated with 'five Mahāpātakas'. The Chāndogya Upaniṣad quotes a verse which declares that, "The five great sinners are the thief of gold, the drinker of surā ... and one who associates with any of the preceeding four"[1], and as the verse

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f.n. continued from last page)

4. Yad dyūtavyasanāndhena kṛtam, Asahāyabhāṣyam, 37, vide Dharmakośa, op.cit., p.696.
5. Vide, G.Jha, trans., Manusmṛti, vol.IV, pt.I, cit.above, p.202
6. Vide, H.T.Colebrooke, op.cit., p.304.

1. P.V.Kane, H.Dh., vol.IV, (Poona, 1953), 10-16,
   Tad eṣa ślokaḥ/steno hiraṇyasya surāṁ pibaṁśca gurostal-pamāvasan brahmahā caite patanti catvāraḥ pañcamaś cācaraṁs taiḥ / iti /
   Chā.Upa.V.10-9, vide, ibid., p.12, f.n.25; also see, F.Max Müller, trans., S.B.E.1, (Oxford, 1879), pp.83-84.

is apparently a quotation, it seems to suggest that this view existed even prior to that period. We find declarations of similar expressions made by various śāstrakāras[1] of the later period. And after a careful study of all these statements, it seems beyond doubt that they are unanimous in their treatment of drinking spirituous liquor as one of the five great sins.

This, of course, is the view of the dharmaśāstra.

The arthaśāstra, like the dharmaśāstra, excludes[2] drinking debts of the father from the son's liability, but does not appear to treat drinking of spirituous liquor in the same way as has been done by the latter. Its attitude in this respect is apparently different and may be summarised as follows: - There is no general prohibition against drinking wine.[3] It may always be available for medical purpose,[4]

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1. "They state that there are five mortal sins (Mahāpātaka); (viz violating) a guru's bed, drinking (the spirituous liquor called) surā, ... outcasts ." Vasiṣṭha, I.19-2o, vide G.Bühler, trans., S.B.E.14, cit.above, p.5; "Killing a Brāhmaṇa, drinking (the spirituous liquor called) surā, ... (mahāpātaka)". Manu, XI.55, vide G.Bühler, trans., S.B.E.25, cited above, p.441, cf.Manu IX.235, at p.383 which is almost similar. Also, see Gautama, 21.1; Āpastaṃba, I.21.7-8; vide G.Jha, Notes on Manusmṛti, pt.III, (Calcutta, 1929), pp.83o-831; "Killing a Brāhmaṇa, drinking spirituous liquor ... are high crimes." Viṣṇu, XXXV.1, vide, J.Jolly, trans., S.E.E.7, cit.above, pp.132-133; The Brāḥmicide, the liquor-drinker ... these are the perpetrators of heinous sins (Mahāpātakinaḥ)'. Yājñ., III.227, (according to the Mitākṣarā, this rule applied to one who drinks prohibited liquor.) Vide, J.R.Ghatpure, trans., vol.2 (5-7), (Bombay, 194o), p.1683.

2. Kauṭ., 3.16.9, vide R.P.Kangle, trans., pt.II, cited above, p. 281.

3. Vide, Kangle, op.cit., pt.III, A study, (Bombay,1965), p.161.

4. Kutumbinaḥ kṛtyeṣu śvetasurām, auṣadhārtham vāriṣṭam, anyadvā kartum labheran / Kauṭ. 2.25.35; vide, Kangle, ed., cit.above, pt. I, p.8o; also, pt.II, op.cit., p.179.

and catching criminals[1] or spys[2]. On occasions of festivals permission is to be given for the manufacture and consumption of liquor without control.[3] But there seems to end the argument in its favour, and though it may be a means of getting the state-revenue, Kauṭilya wishes that, in general, it should not be encouraged. Hence, the drinking of wine is to be regulated by the state[4]. He advocates caution against improper indulgence in drinking.[5] He expects the king to have control over his senses[6] such as anger or lust. This is so because, according to him, these are the sources of various vices[7] which lead to dangerous calamities.[8]

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1. Kauṭilya refers to arrests of criminals while 'they are intoxicated with drugged liquor', as Kauṭ., 4.5.1o, and 17, vide ibid., pt.II, p.31o.

2. Traders ... should find out, ... the intentions of strangers and motives, ... when they are intoxicated" ... Kauṭ.2.25.15, ibid., pt.II, p.177.

3. Utsava samājayātrāsu caturaḥ sauriko deyaḥ / Kauṭ.2.25.36, R.P.Kangle, ed., pt.I, op.cit., p.8o, also see pt.II, op.cit., p.179.

4. R.P.Kangle, pt.III, op.cit., p.161; also see Kauṭ.2.25.1-15, ibid., pp.176-177.

5. R.P.Kangle, pt.III, op.cit., pp.13o-131; also, the controls contained in Kauṭ.2.25.3, i.e., "(He should enforce) prohibition of taking wine out of the village ... because of the danger of transgression of the bounds of propriety by Āryas and because of the danger of rash acts by bravoes", are indications of this caution. Vide, R.P.Kangle, pt.II, op.cit., p.176; also see, Kauṭ.8.3.6o-61 (also see f.n.5, p.132 below).

6. Kauṭ.1.6 1-3, ibid.; p.13; also, Kauṭ.8.3.66, (see f.n.5, p.132 below).

7. "A group of three (vices) springs from anger and a group of four springs from lust".
Kauṭ.8.3.4, ibid., at p.455; for further clarification see Kauṭ. 8.3.23 and 38 at p.456.

8. "Lust means the favouring of evil persons, anger, the suppression of good persons. Because of the multitude of evils (resulting from them), both are held to be a calamity without end". Kauṭ.8.3.65, ibid, p.458.

Lust, especially, breeds vices such as hunting, gambling, pursuit of women and drinking[1]. Also, he mentions that addiction to women results in addiction to drink[2]. Of the two, the vice of drinking is more serious,[3] for "the excellences* of drink are: loss of consciousness, insane behaviour of one not insane, appearing like a corpse when not deceased, exposing private parts to view, loss of learning, intellect, strength, wealth and friends, separation from the good, association with the harmful, and attachment to skill in lute and song, destructive of wealth[4]." It is for this reason that, "the self-possessed (king) should give up anger and lust, the starting point of all calamities, the destroyers of patrimony, by waiting upon elders and gaining control over his senses[5]." Now, though all this appears to have been addressed to the king, we have no doubt that, generally, it is equally applicable to any individual and not the ruler alone[6]. In short, even Kauṭilya considers drinking a serious vice, and his view seems quite a realistic one. We may turn, at this stage, to see why drinking has been so condemned by the dharmaśāstra as to classify it as one of the five mortal sins (see above, p.130, f.n.1).

We have already come across the Vedic view (Ṛgveda, VII,86.6 referred to above p.120 f.n.2) which appears quite significant, for it contains a possible explanation of our problem. It is stated there that, "Not our own will betrayed us, but seduction, thoughtlessness, Varuṇa/ wine, dice or anger." Manifestly one of the causes of our betrayal is wine. What is meant here is, it seems, that a person once seduced

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1. Kauṭ.8.3.38, ibid., p.456.
2. Kauṭ.8.3.54, ibid., p.457.
3. Kauṭ.8.3.6o, ibid., p.458.
4. Kauṭ.8.3.61, ibid.
5. Kauṭ.8.3.66, ibid.
6. This chapter, i.e. Kauṭ.8.3 is entitled, "Puruṣa-vyasana-vargaḥ" which means the group of the vices of man, see, pt.I, p.2o9, and pt.II, op.cit., p.455; also see Kangle's pt.III, op.cit., p.131, where he clearly makes a statement to this effect.

* For 'excellences' read "'excellencies' (i.e. result)".

(addicted to) by wine (or any other spirituous liquor), becomes thoughtless due to intoxication, and thus under the influence of the drinks invites self-betryal. The consequences of such betrayals could, as mentioned above (see p. 132, f.n.4) be endless, both in material as well as spiritual sense.

In Manu's estimation, "Surā vai malam annanāṃ pāpmā ca malamucyate / tasmād brāhmaṇa-rājanyau vaiśyas ca na surāṃ pibet //[1], which means "Surā, indeed, is the dirty refuse of grains and sin also is called 'dirt'; for this reason the Brāhmaṇa, the Kṣatrīya and the Vaiśya shall not drink wine[2]" (Before we examine this view, it may be noted here that according to Medhātīthi, "though the subject matter of the present context is expiation, yet the syntactical indication of the present verse clearly points to prohibition of wine. And since it is a distinct sentence, it can not be regarded as a mere declamation[3]"). The analogy between surā and sin might have some value in a metaphorical sense, but in reality this description of wine is indicative of the fact that its use is forbidden, and the assimilation of sin with surā re-enforces the view that wine is one of

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1. Manu, XI.93, vide, V.N.Mandlik, cit.above, p.1392; P.N.Sarma, ed., Vīramitrodaya, Āhnikaprakāśa, (Benares, 1913), p.548., H.N.Apte, ed., Aparārka on Yājñ.III.227 , A.S.S.46, cit.above p.1044.

2. Vide, G.Jha, trans., vol.V, (Calcutta, 1926), p.414; (Note: This verse is numbered '92' in his Sanskrit ed.; vol.I, (Cal.1932), p.398, while G.Bühler's translation enumerates it as '94' at p.45c).

3. G.Jha, op.cit., p.415.

the most despicable things.[1] Is it simply because of its being made out of 'dirty refuse' (if that is true)? One feels inclined to doubt the wisdom of this assertion, for the simple reason that quite a number of useful things were and are being made out of such substance, for example, drugs and medicines. Why, then, should the great śāstrakāra like Manu offer this kind of reasoning to justify his point of view? Once again, Medhātīthi may come to our help. According to him, Manu's prohibition seems to have been directed at the 'intoxicating substance,[2] in wine or liquor, and it cannot, therefore, be applied to any substance which has not acquired intoxicating properties. Thus, "what the prohibition means is, that 'one should not drink that which possesses the capacity to cause intoxication'[3]". Thus it would appear that the intention behind such prohibition seems to avoid basically even the possibility of getting intoxicated; and also, almost certainly to avoid getting into the habit of drinking, the most disastrous consequences of which have been placed before us so vividly by the Ṛgveda and arthaśāstra (see above pp. 130-132). We need not repeat them again here. Suffice it to say that a man who has lost his consciousness and has

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1. Medhā. on Manu, XI.93, "Thus then, in as much as wine is obtained from grains, ... it comes to be spoken of as 'the dirty refuse of grains'. This description of wine is indicative of the fact that its use is forbidden." ... "Sin also is called 'dirt' - this has been added with a view to indicate that wine is a most despicable thing". Vide, G.Jha, trans., vol.V, op.cit., p.414..

   Quoting this verse, Aparārka, on Yājñ.III.227, comments,
   "Annamalatvaṃca vrīhyādipiṣṭamayyāḥ / evam ca na saṃbhavat gauḍī-mādhvyoḥ / na hi guḍamadhunī annam / "
   (vide H.N.Apte, op.cit., p.1044); i.e. 'Being the refuse of grains' is applicable only to that liquor which is distilled from ground grains, and not to those distilled from molasses and honey ... as neither of those two latter is grain'. Vide G.Jha, Manusmṛti, Notes, pt.II, cit.above, p.816.
2. While explaining different kinds of wines, he states, "The Mādharvī is that 'distilled from Madhu, grape-juice, i.e., in its fermented form; for fresh grape-juice ... is not forbidden ... wherever the prohibition contains the word madya (intoxicating substance) it cannot apply to any other substance which has not acquired intoxicating properties."
   Medhā.on Manu, XI.94, G.Jha, trans., op.cit., vol.V, p.415.
3. Ibid., p.416.

become thoughtless due to habitual intoxication from drinking wines and liquors could commit any possible sin or crime. If it is for this reason, the śāstrakāras' classification of drinking spirituous liquor as one of the five great sins seems generally justifiable. Thus, for the same reasons, according to the dharmaśāstra, drinking of spirituous liquor appears to be an immoral act, and, hence, the śāstrakāras seem to have excluded any debt for this purpose (i.e. drinking) from the son's liability to pay his father's debts (see above p.116, f.n.1).

Although this may appear convincing, certain additional literature available on the subject makes the position complicated.

We have seen above (see p.130, f.n.3) that according to Kauṭilya there is no general prohibition against drinking wine, and yet, due to undesirable consequences, and perhaps due also to the financial motive in the interest of the state, he advocated certain restrictions (see p.131, f.n.5) and state-control.[1] On the other hand, he has laid down certain concessions, for a limited period, for festivals, gatherings, and fairs (see p.131, f.n.3) as well as on account of personal integrity.[2]

Thus, those who resorted to drinking within the legal framework of the state authority, would be doing so, it would appear, quite lawfully. If this is so, then can any debt arising from this sort of situation be attributable to the son's liability?

Similarly, even the precepts of the dharmaśāstra seem to have, so far as the prohibition of drinking is concerned, certain variations in the degrees of guilt (or sin attached

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1. "The controller of spirituous liquors should cause trade in wines and ferments to be carried on ... according to (conveniences for) purchase and sale; he should fix .. the penalty for those who manufacture, purchase or sale in other places". Kauṭ.2.25.1-2, Kangle, cit.above, Pt.II, p.176; also see, Kauṭ.2.25. 3-15, ibid., pp.176-177; pt.III, cit.above,pp.161,162.
2. 'or those of known integrity may carry out a small quantity,' ... Kauṭ.2.25-4, ibid., p.176.

to drinking) based on different grounds. These are as under:

(A) kinds of wine or liquor as well as the castes of the drinkers: - thus, Medhātīthi, (on Manu, XI.93, see above, p.133) states that, "the wine extracted from grains should not be drunk by the Brāhmaṇa, the Kṣatrīya or the Vaiśya".[1] Again Manu lays down that, "wine should be understood to be of three kinds ... gauḍī ... paiṣṭī ... and mādhavī; as the one so all the rest should never be drunk by the chief of the twice-born"[2] . And according to Medhātīthi, here the use of the term 'chief of the twice-born' has been used with a view to permit wine-drinking for the Kṣatrīya and the Vaiśya.[3]

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1. Vide, G.Jha, cit.above, vol.V, p.414.
Besides, it is indicative of the śūdra's exclusion. Aparārka on Yājñ.III.227, quotes this verse and comments, "thus then the drinking of liquor distilled from grains is forbidden for all twice-born men, and the other two kinds for the Brāhmaṇa only". Vide G.Jha, Notes, cited above, pt.II, p.816:
tataśca paiṣṭīpānam dvijānām pratiṣiddham /
paiṣṭyā itarayośca Brāhamaṇasyeti mantavyam /
Apar.on Yājñ.,227, vide H.N.Apte, ed., cited above, pt.II, p.1o44.) For similar comment, also see the Mitākṣarā on Yājñ III.253, vide J.R.Gharpure, trans., cit.above, p.1754.

2. Manu, XI,94, vide, G.Jha, vol.V, op.cit., p.415.
"Distilled from sugar --- these ten intoxicating drinks are unclean for the Brāhmaṇa; but the Kṣatrīya or the Vaiśya commit no wrong in touching or drinking them." Viṣṇu, 22.82, vide G.Jha, Notes, cit.above, pt.III, p.842.

3. Medhā.on Manu, XI, 94, ibid., p.417; where he cites the Mahābhārata as describing how the Yādavas and the Bhāratas were found drunk; while the Mitākṣarā,(op.cit., at p.1754) refers to the same instance.
Ubhau madhvāsavakṣībāvubhau ... /
Arjunasya ca Kṛṣṇāyām satyāyām ca mahātmanaḥ //
The M.Bhā. Udyogaparva, 58 5-7; vide S.K.De, ed., B.O.R.I., vol.6, (Poona, 194o), p.276. Also see P.C.Roy, trans., The Mahābhārata, vol.5, (Calcutta, 1886), p.2o8.

Aparārka seems to confirm this rendering. Thus, he (on Yājñ. III.227) quotes and comments upon the verse to the effect that

> "The liquor distilled from grains is here made an example of prohibited drink; which means that this is the principal kind of liquor and the other two are only secondary; it is for this reason that though all the three are equally forbidden for the Brāhmaṇa, the former alone is forbidden for the Kṣatrīya and the Vaiśya".[1]

But does this mean that the sin committed due to the principal kind of liquor is greater in degree than that committed by drinking the rest? The Mitākṣarā (on Yājñ. III.253), seems not to think so; for it considers that, "this text" (i.e. Manu, XI.94), "is intended to demonstrate the equality of sin in regard to the three kinds of surās, and not as demonstrating the equality of these two, viz. the Gauḍī and Mādhavī with the Paiṣṭīsurā".[2] If this is so, then one wonders why only the Paiṣṭī is prohibited to the three castes, and, at the same time, the Gauḍī and the Mādhavī are left open for the Kṣatrīya and the Vaiśya; Whatever may be the reason, this view seems sounder and more in keeping with the general prohibition recommended regarding the 'intoxicating substance' (see above p.134), irrespective of the kind of wine or liquor. One thing is quite clear, however: all kinds of liquor are forbidden to the Brāhmaṇas.[3]

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1. G.Jha, Notes, op.cited, pt.II, p.817;
   'Ekāṁ paiṣṭīṁ dṛṣṭāntīkṛtya sarvasyā Brāhmaṇaṁ prati pāna niṣedhaṃ kurvannekā mukhyā gauṇītareti darśayati / evaṃ ca Brāhmaṇasya tistro 'pyapeyāḥ, Kṣatrīyavaiśyayo-stu paiṣṭyeva' / Aparārka on Yājñ.III.227; vide, H.N.Apte, ed., op.cit., p.1044.
2. The Mitā.on Yājñ.,III,253, vide, J.R.Gharpure, trans., op.cit., p.1753; also see, G.Jha, Notes, op.cited., pt.II,p818
3. 'Yakṣarakṣaḥ piśācānnaṃmadyam māṃsaṃsurāsavam / tadbrāhmaṇena nāttavyaṃdevānāmaśnata haviḥ // Manu, XI.95; vide, V.N.Mandlik, ed.; cit.above, p.1394.; i.e., "Intoxicants, meat, wine and distilled liquor are the food of Yakṣas, Rākṣasa and Pishāchas; it should not be taken by the Brāhmaṇa who partakes of the offerings to the Gods." Manu, XI.95; vide G.Jha, op.cited, vol.V, p.417; also see, G.Bühler, trans., cit.above, p.450; J.R.Gharpure, op.cit., p.1754; G.Jha, Notes, op.cit., pt.II, p.817, and Madanapārijāta (p.814), quoted, at ibid., Viṣnu,22.82,ibid.III,p.842; Haradatta on Gaut., II.2o, vide G.Bühler, trans., S.B.E.2, cit.above, p.186, f.n.2o.

(B) Secondly, there were, it seems, certain occasions and uses for particular purposes, which were treated differently from the general rule regarding prohibition. Thus, there is mention of cups filled with wine in the Sautrāmaṇi sacrifice.[1] And to this Jagannātha refers as an authority for the proposition that "the use of spirituous liquors is authorized by law[2] on such occasions. As regards spirituous liquor being used for medical purposes, and the same being considered by the śāstras as an excusable act, we note Medhātīthi's explanation for the milder expiation sanctioned by Manu. He says,

> "This expiation is meant for those cases where wine is taken as medicine when life is in actual danger; though wine-drinking in such circumstances has been permitted by certain texts."[3]

Vijñāneśvara appears to agree with this view. He refers to the views of Baudhāyana, Yama and Bṛhaspati and states that,

> "all these three also are to be understood to be in the case of drinking for the abatement of a disease which cannot be accomplished by any other medicine, since the prāyaścitta is very small".[4]

Undoubtedly, these views support the above proposition in respect of the use of wines and liquors for medical purposes.

(C) Lastly, a distinction has apparently been made while determining the expiation as to whether the act of drinking was intentional or innocent, and whether it was the first instance or a repeated occurrence. According to Āpastaṃba, "A drinker of spirituous liquor shall drink exceedingly hot liquor so that he dies."[5] This rather

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1. 'Sautrāmaṇyāṃca graheṣu', Jaimani sūtras, III.5.14, which means "And in a Sautrāmaṇi sacrifice, in the cups ... some of them are full of milk and some of them are full of wine". Vide, M.L.Sandal, trans., The Mīmāṃsā sūtras of Jaimini, (Allahabad, 1923), p.144.
2. Vide, H.T.Colebrooke, trans., cit.above, p.3o4.
3. Medhā. on Manu, XI.92, vide, G.Jha, cited above, p.413; also see G.Bühler, trans., cit.above, p.45o, f.n.93.
4. The Mitā.on Yājñ., III.254, vide, J.R.Gharpure, op.cit., p.176o.
5. Āpastaṃba, I.9.25.3, vide, G.Bühler, trans., op.cit., p.82, also see, Yājñ. II.253, vide J.R.Gharpure, op.cit., p.1751.

vague statement is, however, qualified by others,[1] who apply this rule to Brāhmaṇas. Even this seems to have been further qualified so as to apply to those Brāhmaṇas who have drunk surā both intentionally and repeatedly. Thus, Vasiṣṭha lays down that, "But a Brāhmaṇa who repeatedly (and intentionally partakes) of liquor extracted from rice, he shall drink (liquor of) the same (kind) boiling hot. He becomes pure after death."[2] Also there are various references to the penances for unintentional drinking.[3] Of course, the rules applied to others also, and were not restricted to the Brāhmaṇas alone.[4] Thus, these authorities more than prove the point, made above, regarding the variations in penances in respect of intentional and / or habitual (or otherwise) drinking of wine or liquor. And, from the point of view of our study, we need not go into further details.

Now, following this line of argument, there seems hardly any doubt that the above discussion reveals technically, at least in certain cases, that the drinking of spirituous liquor may be neither 'illegal' according to the arthaśāstra (see above p.136), nor 'immoral' in the view of the dharma-śāstra[5] (see above p.136, f.n.3). In other words, any debt

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1. See, Gaut.XXIII.1, vide G.Bühler, op.cit., p.284; Baudhāyana, II,I,1.18, vide G.Bühler, cit.above, p.1o5; Manu, XI.9o, vide G.Jha, cit.above, vol.V, p.412.

2. Vasiṣṭha, XX.22, vide G.Bühler, trans., S.B.E.14, cit.above, p.1o5; also see, Haradatta on Gaut.XXIII.1, where he states, "that the offence must have been committed intentionally and repeatedly in order to justify so severe an expiation". Vide G.Bühler, trans., op.cit., p.284.

3. Gaut. XX.III.2, Baudh., II.1.1.19; Vasiṣṭha, XX.19; Medhā.on Manu, XI.92; Bṛ.q. by the Mitā. on Yājñ.III.253& Yājñ.III.255.

4. "For having through ignorance, however, drunk surā ... the twice-born of the three varṇas become amenable for reconsecration." Yājñ., III.255, vide J.R.Gharpure, trans., op.cit., p.1762, G.Jha, Notes, cit.above, pt.III, p.842; see Baudh.,II.I.1.21, which is similar.

5. "Intentionally even if a Kṣatrīya, or a Vaiśya also, somehow by drinking the surā wine, do not incur a sin".Bṛhad Yājñ. quoted by the Mitā.on Yājñ. III,253; also he refers to Vyāsa in support of this view. Vide, J.R.Gharpure, trans., op.cit., p.1754.

due to such drinking would appear untainted. And if this could be accepted, would it not be correct to say that that should fall under the general principle of Hindu law, which obliges the son to pay his father's untainted debt? One would think it should; but even that thinking, it seems, would appear to be a fallacy. For, in the first place, the above results arose, in fact, from discussions, the context of which, in the case of the arthaśāstra, relates to the topics concerning 'control over the senses'[1], 'the controller of spirituous liquors'[2] and 'the group of the vices of man'[3] and in the case of the dharmaśāstra, it is concerned with 'penances'. Again, the whole discussion is directed at the behaviour of the drinker and has nothing to do with his son, or his son's liability for his father's debt. On the other hand, the fact is that by nature the spirituous drinks are such that, whether one drinks with or without the śāstric permission, the consequences are hardly likely to differ. And it is for the avoidance of the consequences that the śāstrakāras have, in spite of a few contrary allowances, advocated restraint (see above pp.130-134) in the overall interest of society as a whole. This overriding interest would rarely be served by extending the creditworthiness of drunkards by making their sons pay their liquor-bills. In the view of the śāstras, spirituous drinks remain despicable, and it is in this sense that the above exceptions would seem illusory, and hence, so far as the father's liquor-bills are concerned, the definitive and unanimous injunction, laid down by the śāstrakāras (see above p.116, f.n.1-2), expressly for the purpose of exonerating the son from this liability, would appear justifiable. On this point,[4] the Maskaribhāṣya (on Gautamadharmasūtra) seems to agree with this conclusion.

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1. Kauṭilya Arthaśāstra, Book I, Chapter 6, vide, R.P.Kangle, cit.above, pt.II, pp.13-14.
2. Kauṭilya Arthaśāstra, Book II, chapter 25, ibid, pp.176-180.
3. Kauṭilya Arthaśāstra, Book VIII, chapter 3, ibid., pp.455-458
4. Madyam madyanimittam Brāhmaṇasyapratiṣidhatvāt Kṣatriyādi viṣayametad draṣṭavyam/dravyam dadāmīti madyapāne kṛte dravyamadatvā 'sau mriyate tadapi putrasya na bhavatīti / Maskari on Gaut., XII.38, vide, the Dharmakośa, cit.above, vol.I, p.678.

Now we may turn to our second problem: the scope of this exception. As we have seen above (pp.116-121), the śāstrakāras seem to have merely laid down the exception. The commentators have tried to explain it. Govindarāja[1] (on Manu.VIII.159) states that 'the amount which is due to the liquor vendor as price of liquor (bought for) drinking'. Thus, in his view, by saurikam Manu seems to refer to that debt of the father which he incurred either by way of drinking liquor or buying it for the purpose of drinking. Perhaps debts for liquor which was bought for any other purpose than drinking seem not to have been envisaged. Also, he does not indicate whether the rule applied to a habitual or an occasional drinker's debts. According to Medhātīthi's rendering[2], however,

> "debts due to drinking are said to be 'due to liquor'; 'liquor' standing for all sorts of intoxicating drugs. Hence the present denial pertains to the debts of a man who is an inveterate drunkard".[3]

This explanation, too, appears, by implication, to confirm the above view. But the scope of the above exception is apparently further narrowed to include only the habitual drunkard; or it may be that his views lean heavily in favour

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1. 'Surāpānādeḥ yad dhvajināḥ surāmulyam', ibid., p.663. Also see, Viśvarūpa on Yājñ., II.53, 'Surām pītvā yan mūlyam na dattam' / ibid., p.685; 'Surāpānena yatkṛtam ṛnam', the Mit.on Yājñ., II.47, vide B.S. Moghe, cit.above, p.102; V.P.Bhandari, ed., The Vīramitrodaya, Vyavahāraprakāśa, cit.above, p.265; N.S.Khiste and J.S.Hosinga, ed., cit.above, p.469; R.K.Ranade, cit.above, p.35; J.R.Gharpure, trans., cit.above, p.786; 'saurikam tatpītasurāmūlyam', Sarvajñanārāyaṇa on Manu, VIII.159, vide, V.N.Mandlik, ed., cit.above, p.975, 'Saurikam surāpānanimittam', The Vivāda-ratnākara, vide P.D.Vidyalankara, ed., cit.above, p.57; 'for procuring spirituous liquor', the Smṛticandrikā, J.R.Gharpure, trans., cit.above, p.319; 'incurred for drinking spirituous liquor'; Śūlapāṇi on Yājñ.II.47, vide J.R.Charpure, trans., cit.above, p.788.
2. 'Surāpāna nimittam saurikam surāgrahaṇamma-dyopalakṣaṇārthamtena yaḥ pānaśauṇḍotyamtamadya-pasta-dṛnapratiṣedhaḥ / Medhā.on Manu, VIII.159, vide V.N.Mandlik, ed., cited above, p.975.
3. Vide G.Jha, trans., cit.above, vol.IV, pt.I, p.203.

of applying the exception to the cases of confirmed addicts only. This point seems to have been traced further by Asahāya. He, while commenting on Nārada, IV.1o, with reference to the term surā states Yatsurāvyasanāndhenakṛtam;[1] meaning thereby (the debt of the father) due to blinding (influence of) addiction to drinking of liquor ; i.e., debts arising out of the balance of payment due (from purchase of liquor) for meeting the demands of one's own habit of drinking which cannot be kept under control.

In short, the debt contemplated by the śāstrakāras under this heading appears to be one which a Hindu father incurs by way of drinking or buying liquor for the purpose of drinking only. In other words, it seems to exclude all debts due for purchases of liquor for any other purpose, such as medical use, etc.. Although Medhātīthi and Asahāya seem to restrict the rule to the cases of inveterate drunkards, the majority view (see above p.141, f.n.1) appears to favour inclusion of all cases of drinkers, irrespective of how often or how much they drink. Thus the scope of this exception -- the son need not pay his father's debt for spirituous liquor - appears to extend to any debt which the father incurred by way of drinking or buying spirituous liquor for the prupose of drinking only.

This leads us to our next topic: debts due to futile gifts.

III.5 DEBTS DUE TO FUTILE GIFTS

We have already seen (see pp.117-119) that Vasiṣṭha, Manu, Yājñavalkya, Bṛhaspati and Vṛddhahārīta have, in their enumerations of the debts non-exigible from the son, mentioned the debts due to 'futile gifts'. The term used by all these

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1. 'Yatsurāpānavyasanāndhena kṛtam' / Asahāyabhāṣyam, 37; (on Nār., IV.1o,Dharmakośa, vol.I,p.696) ; "outrageous state of intoxication". Vide J.Jolly, trans., cit.above, p.45, f.n.1o. According to this translation, it may mean any debt-not necessarily for drinking - incurred while one is completely drunk. It may be pointed out here that this does not seem to be, in this context, appropriate rendering of Asahāya's comments.

śāstrakāras to indicate this sort of debt is 'vṛthā-dānam'.[1] It will be seen that the term has been variously rendered by not only the commentators but also modern scholars. It is needful therefore that, in the first place, we should try to determine as far as possible its proper import. We have to inquire into the causes of its being excepted from the son's liability. The term according to the leading Sanskrit-English dictionaries[2] means, among other things, 'useless or improper gift; a gift that may be annulled or revoked, or not made good if promised'. By way of explanation it is said that it is 'as a gift promised to courtesans, wrestlers,[3] ... etc.. It may, also mean an unnecessary, foolish, idle, wanton, false, unprofitable or fruitless gift; a gift made in vain. Of course, all these 'adjectives' used here to illustrate the meaning of this term vṛthā-dānam, though correct in certain contexts, would not necessarily mean the same thing in all circumstances, and could be open to nuances of interpretation. Perhaps because of this, various commentators have interpreted it in different ways. Thus, according to Medhātīthi (on Manu, VIII.159), it seems to mean "gift promised in joke or under similar circumstances[4]". Medhātīthi visualizes a situation in which the promise of the father (to the effect) has been fulfilled before his death. He then says that the son cannot be made to pay the gift. It may not be wrong if we understand Medhātīthi's rendering of vṛthā-dānam as an act done for fun, foolishly, or, perhaps, in vanity.

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1. Vasiṣṭha, 16.26; Manu, VIII.159; Yājñ.,II.47; Bṛhaspati XI.51; Vṛddhahārīta, 7.249. Cf. Kauṭ. 3.16.4 "And ... a gift of piety to wicked persons or for destructive actions, a gift of wealth to those who are not useful or are harmful, and a gift of love to unworthy persons"; vide R.P.Kangle, trans., cit.above, pt.II, p.281 (see also f.n. 2 below p.148). Although the term vṛthā-dānam has not been mentioned by Kauṭilya, the way in which the commentators on Manu, Yājñ., etc., have rendered this term, one is inclined to treat this verse in the same way.
2. M.Williams, A Sanskrit-English Dictionary, cit.above, p.958; V.S.Apte, Sanskrit-English Dictionary, cit.above, p.885.
3. M.Williams, op.cited, p.958.
4. Vide G.Jha, trans., cit.above, vol.IV, pt.I, p.2o2, 'Vṛthādānam parihāsādi-nimittam pratiśravaṇam ... pitari mṛte putro na dāpyate / Medhā.on Manu, VIII.159; vide V.N.Mandlik, ed., cit.above, p.975.

f.n.4 contd. Bhāruci on Manu VIII.158[159] says that sons are not liable to pay futile gifts and gambling debts because these are analogous to suretyship debts; see Derrett, vol.II, p.144, Consider. cf. Sternbach, vol.I, p.186 (G., Vas. and K.)

On the other hand Rāghavānanda renders it, "promised in jest or to bards and the like".[1] Govindarāja,[2] Sarvajñanārāyaṇa[3] and Kullūka[4] appear to explain it as meaning promise to bards, clowns, pour-boirs and the like . Kullūka actually instances 'amounts incurred by the father in order to make presents to eunuchs, etc.' To Sarasvatī-vilāsa[5] vṛthā-dānam means 'gifts given to dancers and the like'. According to the Mitākṣarā, it means promised to rogues, bards, wrestlers, etc.[6] In support of this meaning, Vijñāneśvara cites a text[7] to the effect that what has been given to a rogue, a bard, wrestlers, quacks, liars and a cheat and to swindlers, itinerant singers, dancers and to thieves carries no fruit.[8]

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1. Vide, R.K.Ranade, in (195o) 52 Bom. L.R.33 at p.36.
"Vṛthādānam parihāsādinā māgadhādibhyaḥ pratiśrutam" Rāghavānanda (on Manu, VIII.159), vide V.N.Mandlik, op.cit., p.975.

2. Vṛthādānam pāritoṣikādi yatpitrā deyatvenāṅgīkṛtam ' // vide, the Dharmakośa, op.cit., p.663.

3. Vṛthādānam chārṇādiṣu / Sarvajña. on Manu, VIII.159, vide, V.N.Mandlik, op.cit., p.975.

4. Vṛthādānam parihāsanimittam paṇḍādibhyo deyatvena pitrāṅgīkṛtam' ... Kullūka on Manu, VIII.159, ibid..
The standard text of Manu with Kullūka (Nirṇayasāgara Press edn., Bombay, 1946, p.318) points daṇḍādibhyaḥ which is an obvious error (on account of fines), attributable to the editor's incredulity when seeing paṇḍādi.

5. Vṛthādānam nartakādidattam'
vide, the Dharmakośa, op.cit.. p.7o9.

6. R.K.Ranade, op.cit., p.36; J.R.Gharpure, trans., cit.above, p.786; S.C.Sarkar, Vyavasthācandrikā, vol.I, (Cal., 1878), p.244; K.K.Bhattacharya, The law relating to the joint Hindu family (Cal., 1885), p.561;
vṛthādānam dhūrta-bandimallādibhyo yat pratijñātam / Mit.on Yājñ.II.47,
vide, the Dharmakośa, op.cit., p.685.

7. Dhūrte bandini malle ca kuvaidye kitave śaṭhe /
cāṭacāraṇacaureṣu dattaṁ bhavati niṣphalam; ibid.

8. J.R.Gharpure, op.cit., p.786; J.R.Gharpure, trans., The Smṛticandrika, Vya.Kāṇḍa, pt. 2, (Bombay, 195o), p.32o; H.T.Colebrooke, cit.above, p.311.

To the Vivāda-ratnākara[1], the term implies a 'fruitless gift' and the Vivādacintāmaṇi seems to agree with this view for it renders it as a futile gift.[2] The consensus of all these opinions seems to suggest that by vṛthā-dānam we should understand a fruitless gift, unnecessarily promised or made. This, however, is but a part of the explanation. According to Nandanāchārya, it means a gift not for religious purposes but to singers and the like[3]. Thus he considers it, besides what others have already said above, something like an adhārmic act. The Vīramitrodaya appears to confirm this, for the term is explained there as a gift "without regard to dharma"[4] (i.e., without dharma as its motive). Jagannātha[5] considers it as "an unprofitable gift promised", which he says "in effect signifies a gift promised with no view to a moral purpose". Bālaṃbaṭṭa[6] seems to tell us that, 'here the gift is futile in the sense that it produces no spiritual benefit, not merely that it produces no material benefit' to the donor. So, the Subodhinī commenting on the same passage of Vijñāneśvara, points out that, "the author mentioned the invalidity of the gift made to rogues, bards, wrestlers etc... by dhūrte bandini malle ca : ... Its invalidity lies on the strength of the text 'bears no fruit' and not because of the absence of a visible result."[7] According to this explanation, therefore, vṛthā-dānam is incapable of bearing any fruit at all, and hence is invalid. Thus, what appears from the above discussion

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1. 'Vṛthādānamaphaladānam', P.D.Vidyalankara, cit.above, p.57.
2. Vide, G.Jha, trans., cit.above, p.29.
3. R.K.Ranade, op.cit., 'Vṛthādānam dharmarahitam gāyakādibhyo deyam / Nandana on Manu VIII,159, vide V.N.Mandlik, op. cit., p.975.
4. The Vīramitrodaya, on Yājñ. II.47; vide J.R.Gharpure, op.cit., p.787;
   Vṛthā dharmam anuddiśya dānam dātum pratiśrutam etatsarvam paitṛkam iha aihikā-abhiyoga nivṛttyartham putro na dadyāt / The Vīramitrodaya, on Yājñ.II.47, vide N.S.Khiste and J.S.Hosinga, ed., cit.above, p.468.
5. Vide, H.T.Colebrooke, trans., cit.above, pp.3o3-3o4.
6. Dhūrtādibhyo dattasya vṛthādāntvam samūlayati ... / atra niṣphalamityuktyā pāralaukika-phalābhāvād vṛthādānatvam vivakṣitam, na tu dṛṣṭa-phalābhāvād iti bhāvaḥ / Bālaṃbhaṭṭa on the Mit., vide N.P. Paravatiya, Vyavahāra-Bālambhaṭṭi,ed., (Benares, 1914), p.18o.
7. Vide, J.R.Gharpure, trans., Subodhinī, (Poona, 193o), p.6o.

with regard to the import of the term vṛthā-dānam may briefly be summarized as follows: although the term has been variously understood and therefore has been variously expounded, all the commentators and the digest writers appear to hold that it is a futile gift. Some commentators consider it so, perhaps, in the sense of sheer waste of assets or wealth. To others, it appears so, because it has no reference to any spiritual or moral benefit. And perhaps because of this, according to the Vīramitrodaya (see p.145) such gifts are without regard to dharma. Thus, then, from the point of view of the śāstrakāras, the term vṛthādānam appears to mean a futile gift, promised or made unnecessarily, without any regard to dharma or moral purpose. It will be observed that mere want of consideration was not the test, since an 'unseen' consideration was, to their minds, a real consideration.

What we are concerned with here is the debt of the father, incurred by way of vṛthādānam, with special reference to his sons' liability to pay it. Before we go into the causes that exonerate the son from this liability, we must clarify a minor point. According to the Vivāda-cintāmaṇi "futile gift ... should be understood to be one that has been 'promised', (not actually given); otherwise, as it would have been already given, there could be no point in prohibiting its payment".[1] This view, it may be pointed out here with respect, appears to be misleading, for it seems to ignore the necessity of prohibition even if the futile gift is actually given, to protect the interests of those whose rights might be affected due to such gifts by one who might be but a joint-owner of the thing given. This is especially true since gifts allegedly for dharma were prima facie binding on the whole family (Mitākṣarā (Colebrooke) I.1.27-29). Moreover, this view does not appear to take into account a situation wherein a Hindu father makes a futile gift after borrowing money (or '

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1. Vide, G.Jha, trans., cit. above, p.29.

any other thing) from others, and is unable to repay either due to his death or otherwise. But for the prohibition, would not the son be liable to pay it? One would think that he would be liable under the general rule of the śāstra. It would appear therefore that the distinction made by Vācaspati Miśra would lead, unless it is applied to one who is the absolute owner[1] of the thing given, to the consequence which (besides others) he himself does not seem to approve of. Thus, it may safely be concluded that the prohibition applied to the futile gifts both promised as well as actually given. This leads us to our enquiry into the causes that exonerate the son from his liability to pay such debts to his father. The basic cause of placing this sort of debt into the exception under consideration seems to lie in its unmeritorious nature in the eyes of the śāstras. Unmeritorious because of its disregard of dharma and morality, as appears to have been implied in the comments of Nandanāchārya, the Vīramitrodaya of Mitra Miśra, Jagannātha and Bālambhaṭṭa; or as the Subodhinī seems to treat it '(invalid) for it bears no fruit' (see above p.145). Of course, the fruit referred to here has to have some connection with righteousness; or so it would appear from the implications of the above comments. Thus the whole argument seems to revolve around the view that because the śāstrakāras considered vṛthā-dānam of an unmeritorious nature, debts contracted for such gifts need not be paid. The reason, in short, must be that while gifts having an 'unseen fruit' (adṛṣṭa-phala) will prima facie bind the family, those which have none such (e.g. promises to singers, etc.) will not (according to dharma itself) be validly incumbent on the sons. But can we, in support of this proposition, show some direct or positive connection between such gift and unrighteousness or immorality? Let us say, for example, that a Hindu father

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1. Vide, G.Jha, op.cited, p.6o; also see f.n.there according to which 'at one's pleasure' - even without the consent of brothers and others - say the Vīramitrodaya (p.395);
   Svecchādeyam svayamprāptam ... (Bṛ.q. in the Vivāda-ratnākara; cit.above, p.13o;) that is to say, "Self-acquired property may be given away at one's own pleasure".
   Vide, G.Jha, H.L.S., cit.above, p.271.

incurred debts due to gifts made to singers, dancers or wrestlers. Such gifts may be regarded as rewards[1] given in honour or enjoyment of their art and hence would appear to be valid. But at the same time, especially in the context of their sons' liability to pay the debts due to such gifts of the father, one needs to go beyond this self-satisfaction or enjoyment of the father. It contains symptoms of lust, for out of this kind of enjoyment, perhaps, develops the liking for dancing girls and the like. Thus, looked at from this angle, such gifts could be directly connected with immorality (and so also could the gifts to cheats and rogues,[2] etc.). Historically, it has been a fact of life for those who were rich and powerful, that they generally indulged in hiring and keeping singers and dancers and made grandiloquent promises and boastful inducements to artistes especially at entertainments organised by themselves (e.g. the biblical

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1. What is given as a reward for satisfaction' ... these eight kinds of gifts are valid" Br., 15.8, vide G.Jha, H.L.S., op.cit., p.274; 'Reward is, however, variously construed. It means 'given to dancers and musicians', (the Vivāda-cintāmani, p.60), ibid.; or 'given to actors or others'; vide, G.Jha, trans., the Vivādacintāmani, cit.above, p.63; but according to Aparārka, "tuṣṭyādyupādhikam putrajanmādiśrāvakebhyo yacca"../ conveying happy news, such as that of birth of a son ;
vide, H.N.Apte, ed., A.S.S.46, cit.above, p.781;
also see, G.Jha, H.L.S., op.cited, p.274.

2. 'vṛthā-dānam dhūrtādibhyo datiam' / Parāśara-dharmasaṃhitā, vide, V.S.Islampurkar, ed., vol.3, pt.2, (Bombay, 1911), p.266;
'Dharmadānamasādhuṣu karmasu caupaghātikeṣu vā,
arthadānamanupakāriṣvapakāriṣu vā kāmadānamanarheṣu ca / Kauṭ., 3.16.4,
vide R.P.Kangle, ed., cited above, pt.I, p.121 (see also f.n.1 on p.143 above). It should be noted here that these gifts are considered by the author as 'avyāvahāryam' (see Kauṭ.3.16.2-3); cf. 'Pratiśrutyāpyadharmasaṃyuktāya na dadyāt' / Gaut. q.in the Vivāda-ratnākara, op.cit., p.133; 'even when one has promised a gift, one should not give it to a person beset with unrighteousness',
vide G.Jha, H.L.S., op.cit., p.268.

incident reported at Mark VI.23,* and cf. Esther V.3,6). That habit exists to some extent even to this day. This way of life became, in course of time, something of a matter of prestige, leading to a kind of obsession, which results, often, in destruction of great men and families, due to over-indulgence. Often even those who could not afford such a style of living were drawn into it. Apparently, such gifts had nothing to do with righteousness but, no doubt, were amoral, irrespective of their possibly being also immoral. It is in this sense, probably, that the commentators (see above pp.145-146) considered the term vṛthā-dānam adhārmic or immoral;[1] for such gifts could conceivably be conducive to spreading vice and crime. It is for this reason, then, that the śāstrakāras seem to have excluded debts of the father, due to such gifts, from the son's liability to pay.

III.6 DEBTS DUE TO LUST OR ANGER

Kauṭilya, Yājñavalkya, Vṛddhanārīta, Bṛhaspati and Nārada have clearly expressed their views that a debt of the father due to lust need not be paid by the son (see pp.116-119 above). Of these, only the last two śāstrakāras have referred, in this connection, to debt due to anger or wrath. The Sanskrit words kāma and krodha stand for lust and anger respectively. Kāma-Krodhādi is a Sanskrit cliché for emotional unbalance such as deprives the mind of judgment. It seems that both these words have, in any case, a wider connotation in Sanskrit than what is implied by lust or anger in English.[2] Thus, kāma means, among other things, "wish, desire, love,

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1. Jagannātha, while commenting on the Mit.on Yājñ.II.47, seems to suggest that because such debt comes under the text of Vyāsa, "nor any debt for a cause repugnant to good morals", it need not be discharged by the son. Vide H.T.Colebrooke, trans., cit.above, p.311.
2. H.W.Fowler and F.G.Fowler, adapted by, the Concise Oxford dictionary, 4th edn., (Oxford, 1950), p.715, and p.44 respectively, cf. the meanings of these words, given by the three dictionaries referred to below.

* A vṛthā-dānam indeed!

the object of desire or love, the god of desire or love [1] or desire of sensual enjoyment, ... desire of carnal gratification, lust".[2] Krodha means "anger or wrath , ... anger considered as the feeling which gives rise to the raudra sentiment (in rhetoric)[3]." According to the śāstras, however, both these words seem to represent two of the most vicious human sentiments or vices (see below p.155ff). Having this information as the background, we may, now, proceed with our enquiry into the debts due to lust (kāmakṛtam ṛṇam) or wrath (krodhakṛtam ṛṇam) as envisaged by the śāstrakāras.

(a) Debts due to lust: According to Kātyāyana, "what was promised, whether in writing or without writing must be paid, but (what was promised) to the wife of another should be known as a debt due to lust."[4] In view of the Mitākṣarā[5]

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1. M.Williams, A Sanskrit-English Dictionary, cit.above, p.219.
2. V.S.Apte, Sanskrit-English Dictionary, cit.above, p.348; also see, L.R.Vaidya, The Standard Sanskrit-English Dictionary, 2nd edn., (Bombay, 1916), p.1804.
3. Ibid., (L.R.Vaidya), p.217.
4. Kātyā., 564, vide P.V.Kane, trans., cit.above, p.234; also see, P.V.Kane, trans., The Vyavahāra-Mayūkha, cit.above, p.217, f.n.1; The Smṛticandrikā, p.170, vide J.R.Gharpure, trans., cit.above, p.320; The Vivāda-cintāmaṇi, vide G.Jha, trans., cit.above, p.29; R.K.Ranade, cit.above, p.36; H.T.Colebrooke, trans., Digest, vol.I, cit.above, p.309.
   'Likhitam muktakam vāpi deyam yattu pratiśrutam /
   parapūrvastrīyai yat tu vidyāt kāmakṛtam nṛṇām /
   Kātyā. 564,
   vide P.V.Kane, ed., op.cit., p.71; also see, the Vivāda-ratnākara, vide P.D. Vidyalankara, ed., cit.above, p.58; the Dharmakośa, cit.above, vol.I, pt.2, p.713; K.V.Rangaswami Aiyangar, ed.; The Kṛtyakalpataru of Lakṣmidhara, vol.12, Vyavahārakāṇḍa, (Baroda, 1953), p.316; V.S.Islampurkar, ed., Parāśarasaṃhitā, cit.above, p.266; The Vīramitrodaya (on Yājñ.II.47), N.S.Khiste, J.S.Hosinga, ed., cit.above, p.469.
5. Vide, J.R.Gharpure, trans., cit.above, p.786, H.T.Colebrooke, op.cit., p.311; Kāma-kṛtam strīvyasana nirvṛttam', the Mit. on Yājñ.II,47; vide, B.S.Moghe, ed., cit. above, p.102.
   It may be noted here that Gaut. (XII.38), quoted here,differs from others in that itexcludes the term 'prātibhāvya-vaṇik,' but adds kāma instead, cf. Medhā.on Manu, VIII.159.

(on Yājñ. II.47), kāma means 'lust' and a debt contracted for kāma is one 'brought about by a passion for women'. Śūlapāṇi treats it as a debt 'for sexual intercourse with women belonging to others'[1]. According to the Vivāda-cintāmaṇi, it is 'Gift promised through lust, i.e., in adulterous love-making'.[2] Thus, what appears from all these renderings is that on one hand, the term kāma seems to mean, here, an illicit sexual relationship between a man and a woman; and that, on the other hand, the woman involved seems 'to belong to others'. Does this mean that there were no women in the society of the day, who belonged to none? For, if there were any free women, then obviously the question arises as to the consequences if the father (a debtor, in our case) had such a relationship with a woman not belonging to others; i.e., a widow.

To the Smṛticandrikā, 'a woman, belonging to another' - parapūrva-strīyai - means another's wife',[3] but according to the Vivāda-ratnākara,[4] the term parapūrva, (already married woman), here stands for all such women as are not married to the man himself. It may therefore be understood, in view of this explanation, that even if there were any women not belonging to others, it made no difference to the basic proposition, (so long as they were not married to him), and hence the objection seems to be immaterial. Asahāya's rendering of Nārada[5] (IV.1o), appears to throw some further light on this point. When he says, yat kāmāndhena dāsīsambandho kṛtam[6], which may mean '(a debt contracted by one) blinded

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1. Vide J.R.Gharpure, op.cit., p.788; H.T.Colebrooke, op.cit., p.311.
2. Vide G.Jha, cit.above, p.29.
3. Vide J.R.Gharpure, trans., cit.above, p.32o.
4. 'Parapūrvā śabdaścā pariṇītastrīmātraparaḥ', The Vivāda-ratnākara, vide, P.D.Vidyalankara, ed., cit.above, p.58; also see, G.Jha, trans., The Vivāda-cintāmaṇi, op.cited, at p.29; H.T.Colebrooke, cit.above, p.3o9.
5. According to J.Jolly's trans., cit.above, p.45, (where it is Nār., I.1o).
6. Vide the Dharmakośa, cit.above, p.696; cf.,'Kāmakṛtam dāsyādibhiḥ', Nāradīyamanusaṃhitābhāṣyam; ibid., also see, J.Jolly, op.cit., p.45, f.n.1o.

by strong passion (sexual love) for a concubine (or a maid servant)'. It appears that, here, the emphasis is on the debtor's strong passion, especially for women other than his wife, which drives him to incur debt - thus creating a direct link between 'lust' and 'the debt'. How? The Vivāda-ratnākara[1] explains the process by which such debt arises out of lust. It is stated there, "Having promised a gift to another man's wife and being unable to pay it, the man borrows the required money and pays it; this is the debt that is said to be 'contracted through lust".[2] A valuable passage, this proves the true motive behind the transaction taints even remoter transactions related to it. In the view of Jagannātha, however, "whatever is promised, or borrowed and given, for the abduction of a woman with whom intercourse is criminal, must be considered as a debt incurred under the influence of lust",[3] and therefore he concludes that such debt need not be paid by the son or other heir.

Thus, this discussion quite clearly suggests that the debt due to kāma (lust) has reference particularly to the debtor's passionate sexual relationship - a criminal act with a woman not his own;[4] and also, it seems to confirm, without dissent, that such debt is excluded from the son's liability, due to the reasons given above.

(b) Debts due to anger or wrath: Although Bṛhaspati and Nārada have mentioned this debt, it is Kātyāyana who has explained it as follows:

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1. 'Parapūrvvāyai dhanam pratiśrutyāsaṃpattāvṛṇam
   kṛtvā dīyate yat tat kāmakṛtamṛṇam /'
   The Vivāda-ratnākara, cit.above, p.58.
2. Ibid., noted by G.Jha, trans., The Vivada-cintamani, p.29, f.n.ℊ.
3. H.T.Colebrooke, trans., cit.above, p.31o.
4. "Consequently that only which was promised for the sake of enjoying an adultress, constitutes an obligation incurred under the influence of lust." Ibid..

> "Where (the father) after having caused through anger (physical) injury to another or having destroyed the latter's wealth, promises something that pacifies him (the person wronged), that is declared to be a debt incurred through (the influence of) anger."[1]

The comment made above about remoter transactions obviously arises again here. Thus, what appears from this explanation shows that the cause of liability arises from the debtor's criminal act or even from his civil wrong, and it is his anger which is the basic cause of all this.

Aparārka (on Yājñ.II.47), the Vivāda-ratnākara, and the Smṛticandrikā have all extended similar explanations.[2] The Asahāyabhāṣyam (on Nār.IV.1o), however, puts it in a slightly different and intriguing way. It is stated there that such debt is contracted by one, "incensed by wrath against his own son".[3] On the other hand, the Nāradīyamanu-saṃhitābhāṣyam seems to expound the same term (krodha-kṛtam) like this: krodha-kṛtam putrādidveṣeṇa saha bhāryādibhir vā[4] which may mean, 'under the influence of wrath due to hatred against (one's own) son or wife'. Thus, Asahāya seems to

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1. Vide P.V.Kane, op.cit., p.234; also, all the references given in f.n.4 at p.15o;
   'yatra hiṃsām samutpādya krodhād dravyam vināśya vā / uktam tuṣṭikaram yattu vidyātkrodhakṛtam tu tat // Kātyā., 565;
   vide P.V.Kane, ed., cit.above, p.71; also all the references cited in f.n.4 at p.15o above.
2. Aparārka, quoting Kātyā., states
   'Ayam arthaḥ: parasya hiṃsām dhanavināśam kṛtvā tat tuṣṭaye yad dravyam dātavyatvenāṅgīkṛtam tad ṛṇam krodha-jitam iti /
   vide, H.N. Apte, ed., A.S.S.46, cit.above, pp.648-649.
   'Yattu krodhavaśena paradravyam vināśya parasya hiṃsām vā kṛtvā tadīyatuṣṭyartham dhanam dātumṛṇam karoti tat krodhakṛtam / The Vivāda-ratnākara, op.cit., p.58-59;
   for further information see, the Smṛticandrikā, cit.above, p.32o; The Vivāda-cintāmaṇi, op.cit., p.29.
3. Vide, J.Jolly, trans., S.B.E.33, cit.above, p.45, f.n.1o;
   'Yat putrasyaivopari krodhāndhenakṛtam',
   Asahāya on Nār.IV.1o,
   vide the Dharmakośa, op.cit., p.696,
4. Ibid.

differ from others more in degree than in substance when he interprets the term krodha, while the last two commentators have put forward a slightly different view from others in that they appear to attribute the debtor's act to a desire to punish his own son. One wonders whether such deliberate action on the part of the father could, in the eyes of the śāstras, be justifiable; for prima facie the act appears unrighteous, and yet there seems hardly any basic difference so far as the source of this action is concerned. For, in the view of all of them, it is the 'anger' of the father. Jagannātha's rendering of the gloss of the Vivāda-ratnākara (see above p.153, f.n.2) on Kātyāyana (565), presents us with yet another version. "What is borrowed to give away for the purpose of destroying another's property, or injuring another man through resentment, is a debt incurred under the influence of wrath[1]". Here again, the fundamental purpose of this kind of debt remains the same though the actual act is supposed to be committed by a third party at the instigation of the father (debtor). The intention to injure is the common factor.

In this whole discussion, however, there appears to be no other reason for incurring such debt than the father's anger (krodha). We know already (see above pp. 149 -150) that the śāstrakāras have absolved the son from liability to pay debts due to his father's lust or anger. But what is the real justification for this exception?

Jagannātha seems to suggest that there is some similarity between the debts incurred under the influence of lust and / or wrath.[2] Let us enquire into the matter. In the view of the śāstra these two - lust and anger - appear almost like two sides of the same coin in the sense that both of them are capable of leading men, generally, to indulge in ~~deadly~~

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1. Vide H.T.Colebrooke, cited above, p.31o.
2. 'Here debt must be understood to complete the similarity between engagements made under the influence of lust and of wrath.' Ibid.

deadly vices.[1] How?

According to the Bhagavadgītā,

> "The man who ponders over objects of sense forms an attachment to them; from (that) attachment is produced desire; and from desire anger is produced (i.e. when the desire is frustrated.)"[2]

And further, upon Arjuna's request to tell him who forces men to commit sin, the Deity said,

> "It is the desire, it is the wrath, born from the quality of passion; it is very ravenous, very sinful. Know that that is the foe in this world."[3]

Hence one should restrain one's senses, then cast off this sinful thing which destroys knowledge and experience. Similar views are expressed in the Vinaya texts;[4] and also the arthaśāstra.[5] Manu (II.214) appears to endorse this view when he declares that, "he becomes a servile follower of

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1. "A group of three (vices) springs from anger, a group of four springs from lust". Kauṭ., 8.3.4; vide R.P.Kangle, cit.above, pt.II, p.455; (Kauṭ., 8.3 - full section, pp.455-58, which deals with various vices of man).

2. K.T.Telang, trans., Bhagavadgītā, S.B.E.8, (Oxford, 1882), p.5o;
   'Dhyāyato viṣayān puṃsaḥ saṅgas teṣūpa-jāyate /
   saṅgāt sanjāyate kāmaḥ kāmāt krodho abhijāyate //
   Bhg.2.62;
   vide, A.Roy, ed.& trans., The Message of Gītā, (London, 1938), p.43.

3. K.T.Telang, op.cit., p.57, cf. "By this evil karman a man falls into perdition (evil way), and so there is no greater enemy to man than lust ... he is led to ... lustful longing", verse 1817, vide S.Beal, trans., A life of Buddha, S.B.E.19, (Oxford, 1883), p.263.

4. "Lusts have been declared ... wherein the danger is great". Kullavagga, I.32.2; vide T.W.Rhys Davids and H.Oldenberg, trans., Vinaya texts, pt.II, S.B.E.17, (Oxford, 1882), p.378, also see, "whatsoever brother, ... has not got rid of the fever of lust ... his mind does not incline to zeal, exertion, perseverance, and struggle." Ketokhila sutta; vide T.W.Rhys Davids, trans., Buddhist Suttas, S.B.E.11, (Oxford, 1881), p.225.

5. Kauṭ., 8.3.66; vide R.P.Kangle, op.cit., p.458.

desire and passion"[1], (or 'anger', according to G.Bühler[2]), and could be led on the wrong path, contrary to usage and scriptures.[3]

One might argue, on the other hand, that "a strong desire or urge often leads to success,"[4] or "resort to anger is ever needed for putting down evil,"[5] so on and so forth. Perhaps, because of this, Bhāradvāja (and others quoted in the whole chapter, Kauṭ., 8.3), does not regard kopa (i.e., anger) and kāma (passion) as vices and is, therefore, unconcerned with their relative seriousness.[6] These are, however, exceptions; and in the context of our study, where passion is understood to represent immoral and criminal sexual activity, and anger to lead to crimes and unjust destruction of other's property, they could hardly be justified. Certainly, no normal person would consider it just to burden sons with debts due to such passion or anger of the father, whether or not the sons themselves are victims of the latter's anger.

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1. G.Jha, trans., op.cit., vol.I, pt.II, (Calcutta, 1921), p.511;
   'Avidvāṃsamalam loke vidvāṃsamapi vā punaḥ //
   pramadā hyutpatham netum kāmakrodha vaśānugatam //
   Manu, II.214;
   G.Jha, ed., Manusmṛti, vol.I, (Calcutta, 1932), p.186.
2. trans., cit.above, S.B.E.25, p.69, 'for women are able to lead astray in (this) world ... man, and (to make) him slave of desire and anger'.
   This rendering seems correct.
3. Medhā.on Manu, II.214; vide G.Jha, trans., op.cited, vol.I, pt.II, p.511.
4. Vide, R.P.Kangle, op.cited, pt.II, p.455, f.n.11.
5. Kauṭ., 8.3.1o, ibid.
6. f.n.11, also see, Kauṭ., 8.3.11-12, "Lust is (a means of) attainment of success, conciliation, generosity of nature and being lovable".
   "And resort to lust is ever needed for the enjoyment of the fruits of works done".
   But Kauṭilya refers to this argument on merit, see Kauṭ., 8.3. 14-15; ibid.

There is hardly anything pious in paying such debts.

In conclusion, therefore, it may be stated that the śāstras seem well-aware of the limited conditional excellences of lust and anger. Yet they appear to have made a good diagnosis of human frailties. To preserve dharma in society, both the dharmaśāstra and the arthaśāstra have advocated the need to control one's own senses. This apparently means enjoyment of sexual pleasures without contravening one's spiritual good and material well-being as laid down by the śāstras. Excessive or improper indulgence in lust or anger, has, therefore, been prohibited, especially because of their (lust and anger) tendency to lead to immoral or criminal acts, which are adhārmic. It is in view of this, and irrespective of what the actual circumstances and outcome may have been in practice, that the śāstrakāras seem to have generally exonerated the son from the payment of his father's debts due to lust or wrath: it was good practice to relieve them from such obligations.

CHAPTER IV

THE DOCTRINE OF AVYĀVAHĀRIKA DEBTS

IV.1 GENERAL

The doctrine of avyāvahārika debts is, perhaps, today the main exception to the general rule of Hindu Law that it is the 'pious obligation' of a Hindu son to discharge his father' debts. But in spite of the fact that the term avyāvahārika has been variously translated and rendered by different commentators, scholars and jurists, its exact import and scope have yet to be defined. It has not been possible, so we are told,[1] to give an exact definition or an exhaustive enumeration of the avyāvahārika debts.

On the contrary, the fact is that the word avyāvahārika or vyāvahārika, though Sanskrit in its origin, is of very common use in every-day parlance and its exact meaning, as commonly understood, does not admit of much controversy,[2] (for further discussion on this point see below pp.167-68). This leads us to a kind of enigmatic situation in which it is hard to believe that the word avyāvahārika, which poses no problem of understanding for a common man, should prove so controversial among scholars and jurists that they cannot agree as to its exact meaning.

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1. P.V.Kane, H.Dh., cited above, vol.III, p.447, "what is meant by 'debts that are not vyāvahārika has presented the greatest difficulty to the medieval commentaries and digests and also to modern courts;" L.J.Manjrekar, (1947) 19 Bom. L.R.,J., 3-1o, at p.3; V.B.Raju, (April, 1939) 41 Bom.L.R., J., 25-32, at p.32 says, " the word avyāvahārika is incapable of definition in precise terms by the use of adjectives other than the indefinitive adjective 'improper';" the writer continues, "there can be no ideal interpretation of the word avyāvahārika except that word itself." Also, see J.D.M.Derrett, at (1964) 1o Lucknow Law Journal, 1-13, at p.3 he seems to describe avyāvahārika as a topic shifting like quick-sands; also his 'Indica Pietas', cit. above, pp.37-66, at p.58; R.K.Ranade, A.I.R.1946 J., 51-53, at p.51; and (195o) 52 Bom.L.R.,J., 33-41 at p.38; T.P.Dubey, A.I.R.1938 J.141-146 at p.141.
2. T.P.Dubey, ibid., at p.144 expresses a similar view.

IV.2 THE MEANING OF THE TERM AVYĀVAHĀRIKA DEBTS

How and why has this situation obtained? Let us investigate, hopefully with the intention of helping to solve the problem.

1. The Śāstric position: The category of debts that are not vyāvahārika is to be found in the enumerations of Uśanas and Vyāsa only.[1] According to the first,

> daṇḍam vā daṇḍaśeṣam vā śulkam taccheṣam eva vā /
> na dātavyam tu putreṇa yac ca na vyāvahārikam //[2]

or in the words of the latter,

> daṇḍo vā daṇḍaśeṣo vā śulkam taccheṣa eva vā /
> na dātavyam tu putreṇa yac ca na vyāvahārikam //[3]

"The son need not pay the fine or the balance of fine, a toll or the balance of the toll, or any debt of the father which is 'not vyāvahārika';"[4] or "Neither a fine, nor a toll, nor the balance due for either, shall be necessarily paid by the son of the debtor, nor any debt for a cause repugnant to good morals."[5]

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1. J.D.Mayne, Treatise on Hindu Law and Usage, 11th edn., cit.above, p.398; L.J.Manjrekar, cited above, at p.4; R.K.Ranade, cit.above, at p.34.

2. The Mitākṣarā on Yājñ.,II.47; B.S.Moghe, ed., Yājñavalkya-smṛti, Vyavahārādhyāya, (Bom., 1879), p.1o2; H.N.Apte, ed., Aparārka on Yājñavalkyasmṛti, A.S.S.46, cit.above, p.648; V.P.Bhandari, ed., Vīramitrodaya, Vyavahāraprakāśa, cit.above p.265; N.P.Parvatiya, ed., Bālambhaṭṭi, cit.above, p.179; Dharmakośa, cit.above, volI, pt.II, p.714; P.V.Kane, H.Dh., cited above, vol.III, p.446, f.n.752; J.C.Ghose, cit.above, vol.I, 3rd edn., (Calcutta, 1917), p.545; L.J.Manjrekar, op.cited, p.4.

3. P.D.Vidyalankara, ed., Vivāda-ratnākara, (Cal., 1887), p.58; N.S.Kiste & J.S.Hoshinga, jt.eds., The Vīramitrodaya and the Mitākṣarā on Yājñavalkya, (Benares, 1924), p.463; G.Jha, Hindu Law in its Sources, vol.I, (All., 193o), p.2o8; Dharmakośa, op.cit., p.714; T.P.Dubey, cited above, p.143.

4. Uśanas, quoted in the Mitā. on Yājñ.II.47; vide L.J.Manjrekar cited above, at p.4

5. H.T. Colebrooke, Digest, cit.above, volI, p.3o7.

Now, although the term yac ca na vyāvahārikam is exactly the same in both the above verses, it may be noted that we are not offered 'exactly the same' translation of the term. But before making any more comments, it is proposed to see what the commentators, modern jurists and scholars have to tell us.

2. The Commentators' views: Aparārka, while commenting on Yājñavalkya, II.47, glosses na vyāvahārikam as na nyāyyam-ityarthah[1] that is to say, 'which is not righteous, or proper.'[2]

The Smṛticandrikā explains the expression na vyāvahārikam saurikamityarthah[3] meaning thereby 'a debt incurred for spirituous liquor'[4] or 'for drinking'.[5]

The Vīramitrodaya on Yājñ.II.47, quoting Vyāsa, explains na vyāvahārikam vyavahārabahiṣkṛtam balātkārādikāritam /[6] i.e., 'not incurred according to law' or 'which is excluded by the law such as that which was caused to be entered into under compulsion.'[7] We note that vyavahāra does not mean 'law' but rather the complex of transactions to which a law-court would give effect. But the same commentator, Mitra Miśra, in his Vyavahāra-Prakāśa (of the Vīramitrodaya), while on the topic of non-payable debts, seems to agree with the Smṛticandrikā when he renders na vyāvahārikam as surāpānādinimittam-iti

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1. Aparārka on Yājñavalkya, cited above, p.648; P.V.Kane, H.Dh., cited above, vol.III, p.447, f.n.754.
2. L.J.Manjrakar, cited above, p.4; R.K.Ranade, cited above, p.51. We must note that nyāyam can also be translated 'reasonable'.
3. The Smṛticandrikā, Vyavahākāṇḍa, p.17o, quoted in the Dharmakośa, cited above, p.715; also see P.V.Kane, op.cit., p.447, f.n. 754.
4. J.R.Gharpure, trans., The Smṛticandrikā, Vyavahākāṇḍa, cit.above, pt.II, p.32o; L.J.Manjrekar, cit.above, p.4.
5. R.K.Ranade, cited above, p.51.
6. N.S.Kiste, cited above, p.469, (however, here the letter na is missing perhaps due to misprint).
7. J.R.Gharpure, trans., Yājñ.Smṛti, (Bom.,1938), p.787; R.K.Ranade, cited above, p.51 & p.38, appears to agree, but T.P.Dubey, cit.above, at p.143 renders it 'what is not proper.'

arthaḥ[1] or surāpānādinimittam[2]. It clearly means, here, a debt incurred due to spirituous liquor, or for drinking wine 'and the like'.[3]

The Vivāda-cintāmaṇi, on the other hand, glosses na vyāvahārikam as vyavahārabahiṣkṛtam[4] or vyavahārabahiṣkṛtam-ityarthaḥ[5] (see the Vīramitrodaya's identical terminology), i.e. 'what is opposed to the ordinary conduct of a person[6]' or 'what is outside the pale of custom or law (what is not admissible in law[7])' or 'what is not admissible under normal conditions'[8] or 'excluded from usual causes'[9].

But according to the Bālambhaṭṭi, a commentary of later period on the Mitākṣarā of Vijñāneśvara, it means na kuṭum-bopayogītyarthaḥ[10] that is to say 'not for the benefit of the family[11]' or 'what was not used for the family.'[12]

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1. V.P.Bhandari, cited above, p.265.
2. P.V.Kane, op.cit., p.447, f.n.754.
3. G.Jha, Notes, cit.above, p.2o8; V.N.Mandlik, ed.& trans., Vyavahāra-Mayūkka & Yājñ.Smṛti, (Bom., 188o), p.113, f.n.4; L.J.Manjrakar, op.cit., p.4.
4. Vivāda-cintāmaṇi, p.17, quoted by P.V.Kane, op.cit., p.447, f.n.754; L.J.Manjrekar, op.cit., p.5.
5. The Dharmakośa, cit.above, p.714 quotes the Vivāda-cintāmaṇi, p.25.
6. R.K.Ranade, op.cit., p.38; L.J.Manjrekar, op.cit., p.5.
7. G.Jha, trans., Vivādacintāmaṇi, op.cit., p.29.
8. G.Jha, H.L.S., cited above, p.2o8, notes.
9. H.T.Colecrooke, trans., cited above, p.3o8; also see, J.D.Mayne, cited above, p.398.
1o. J.R.Gharpure, ed., Bālambhaṭṭi, (Bom., 1914), p.61; P.V.Kane, op.cit., p.447, f.n.754; P.N.Parvatiya, cit.above, p.18o; L.J.Manjrekar, op.cit., p.4; R.K.Ranade, op.cited, p.51.
11. L.J.Manjrekar, ibid.; R.K.Ranade, op.cit., p.38.
12. G.Jha, H.L.S., cited above, p.2o8; and his translation of the Vivāda-cintāmaṇi, op.cit., p.29, f.note.

A modern translation might be, 'not in the family's real interests'.

3. The Modern Jurists and Scholars: According to Jagannātha's Vivāda-Bhangārṇava,

> "The expression in the text of Vyāsa (na vyāvahārikam), is explained by Miśra,[1] 'excluded from usual causes'. Consequently that debt which is contracted for some civil purpose consistent with the prescriptive usage of good men, must be paid by sons and the rest; but if it be the reverse, it need not be discharged."[2]

In other words Jagannātha's explanation amounts to 'avyāvahārika' means 'not consistent with the prescriptive usage of good men.'[3]

We have already referred to the rendering of na vyāvahārikam by H.T.Colebrooke (see above p.160) as 'any debt for cause repugnant to good morals'.[4]

V.N.Mandlik,[5] Jogendranath Bhattacharya[6] and Ganganatha Jha[7] use perhaps the shortest term 'not proper', to translate na vyāvahārikam.

W.Stokes appears to agree, in his edition of Hindu Law Books, with the above view. In this book (as per Borrodaile's translation of the Vyavāhara-Mayūkka) na vyāvahārikam is rendered 'debts improper, (not sanctioned by law or custom).'[8]

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1. Vācaspati Miśra, the author of the Vivāda-cintāmaṇi.
2. H.T.Colebrooke, op.cit., p.308; J.D.Mayne, op.cited, pp.398-399.
3. Ibid.; V.B.Raju, cit.above, pp.26, 31. The original of the phrase is obviously śiṣṭācāraviruddham.
4. H.T.Colebrooke, op.cit., p.307; P.V.Kane, op.cit., p.447, f.n.754; J.D.Mayne, op.cit., p.398; V.B.Raju, op.cit., p.31; L.J.Manjrekar, op.cit., p.5; R.K.Ranade, op.cit., p.38.
5. V.N.Mandlik, cit.above, p.113; J.D.Mayne op.cit., p.399; L.J.Manjrekar, op.cit., p.5; R.K.Ranade, op.cit., p.38.
6. J.D.Mayne, op.cit., p.399; and R.K.Ranade, ibid., quote him as stating this in his commentaries on Hindu Law (2nd edn., p.247), and L.J.Manjrekar, ibid., also refers to this view.
7. Hindu Law in its Sources, cit.ab., p.208; L.J.Manjrekar, ibid
8. W.Stokes, ed., Hindu Law Books, (Mad., 1865), p.123; L.J.Manjrekar, ibid.

Girish Chandra Tarkalankara seems to mean by the term avyāvahārika 'not necessary for life'.[1]

J.R.Gharpure explains it thus: "Whatever is not legal or capable of being recovered by a suit".[2]

To J.D.M.Derrett it means (literally) 'unenforceable by process'[3] or 'not legally enforcible'[4] (because immoral or illegal)[5] or 'such debts as are not capable of being exacted (by the creditor from the father) in a law court'.[6]

Lastly, it may be noted that "the words conventionally used to represent avyāvahārika are 'illegal or immoral'[7]; and though, "(that) expression was doubtless originally meant to render avyāvahārika, it has come to be used as a compendious term to cover all the cases enumerated in the smṛtis."[8]

We have, up to this stage, merely stated the situation as it has been viewed by the smṛtis[9], commentators and digest-writers, as well as a few modern jurists and scholars. What we have observed so far may be summed up as follows:

(a) The controversial term na vyāvahārikam as originally used by Uśanas and Vyāsa, appears to have been applied in the same context, namely: the enumeration of a certain kind of debts of a Hindu father, which are non-exigible from his sons.

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1. J.Mukerjee quotes him in C.Mahton v.G.Prasad, (1911), I.L.R., 39 Cal.862, at p.868; but does not agree with his view; Manjrekar, op.cit., p.5; R.K.Ranade, cit.above, p.39.
2. J.R.Gharpure, cit.above, p.786; V.B.Raju, cit.above, p.31; Manjrekar, ibid.; see our explanation of vyavahāra above.
3. I.M.H.L., cited above, p.313.
4. Ibid., in his select glossary (p.xci).
5. Ibid.
6. 'Indica Pietas', cit.above, p.49.
7. C.M.H.L., p.1o5.
8. J.D.Mayne, op.cit., p.399.
9. For the arthaśāstra-view, see below p.171 ff.

(b) The controversy seems to begin with the various interpretations given of the term na vyāvahārikam by different commentators, e.g. na nyāyam ityarthaḥ (Aparārka), vyavahārabahiṣkṛtam balātkārādikāritam (Vīramitrodaya), vyavahārabahiṣkṛtam (Vivāda-cintāmaṇi), na kutumbopayogī-tyarthaḥ (Bālambhaṭṭi) and saurikam ityarthaḥ or surāpānā-dinimittam (Smṛticandrikā and Vīramitrodaya-Vyavahāra-Prakāśa), see above pp.161-162). Thus, in place of one original term, we have at least five variations, none of which appears, on face of it, to agree exactly with the rest, but at the same time all seem to explain the meaning of the term na vyāvahārikam in their own particular sense.

(c) The trend of these multiple explanations of the term na vyāvahārikam, set in motion by the commentators, appears to have expanded during the period of the modern jurists and scholars (see pp. 163 -164). We have from them their own renderings of the original and of the commentators' renderings of na vyāvahārikam. One may well argue, however, that their interpretations of the term were most likely influenced by their understanding of the commentaries on the subject, e.g. Colebrooke's translation; or, indeed, vice versa, for example the various renderings of the term vyavahārabahiṣkṛtam in the Vivāda-cintāmaṇi (p.162, f.n.6-9). Unfortunately, these and similar combinations seem to have produced the present jungle of interpretations (see above pp.161-164).

(d) Perhaps due to the above situation, a compromise appears to have been struck by treating na vyāvahārikam as 'illegal or immoral'.

Of course, it has not been our purpose merely to state the present position in respect of the debts coming under the category of avyāvahārika, but to try and solve the problem as far as possible. Thus, up to now, we have explained how the present situation came about. Now, let us ask: why?

The word vyāvahārika is an adjective derived from the word vyavahāra, and the terms na vyāvahārikam or avyāvahārika convey the same meaning. According to leading Sanskrit-English Dictionaries,[1] the word vyavahāra means, among other things, "doing, performing, action practice, conduct, behaviour, commerce or intercourse; affair, matter; usage, custom, wont, ordinary life, common practice; mercantile transaction, traffic, trade with, dealing in (comp.); a contract; legal procedure, contest at law, litigation, law suit, legal process; practice of law and kingly government; mathematical process; administration of justice; majority(age); propriety, adherence to law or custom;" etc., and the word vyāvahārika means, "relating to business, engaged in business, practical; judicial, legal; litigant; usual, customary".[2]

Although the above list of the various meanings of the word vyavahāra looks quite long, it is not complete, and yet it appears to be sufficient to explain certain basic facts.

i) All these renderings cannot be attributed to this word at one and the same time, and hence each could make sense only in its proper context.

ii) At the same time, we notice that none of the dictionaries referred to above have mentioned in their enumerations of these various meanings of this word any of the following; i.e., saurikam ityarthaḥ or kutumbopayogītyarthaḥ (the propriety or otherwise of these senses attributed in this context will be discussed below, see pp.17o-171).

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1. M.Monier-Williams, Sanskrit-English Dictionary, cit.above, p.1o34; V.S.Apte, Sanskrit-English Dictionary, (Poona,1959), vol.III, p.1514.

2. Ibid.
It may be noted here that these words, though Sanskrit in origin, are living and currently used in most of the modern Indian languages and convey the same meanings. The following Dictionaries may be referred to:
(a) R.C.Pathak, comp.& ed., Bhargawa's Hindi-English Dictionary, 3rd edn., (Benares, 1946), p.1o11; K.Prasad, ed., Bṛhat-Hindi Kośa, 2nd edn., (Benares, Savant 2o13), pp.1296-7, (b) J.T.Molesworth, comp., A Dictionary, Marāṭhī and English, 2nd edn., (Bom., 1857), pp.776-77.
(c) M.B.Belsare, ed., An Etimological Gujarāti-English Dictionary, 3rd edn., (Ahmedabad, 1927), p.1o75.

iii) Besides, the word is not a dead one. It is a living word[1] and is, even today, used in everyday conversation by prople, villagers and town-dwellers alike, irrespective of their educational level, all over the country.

Why then should the efforts of the jurists and scholars in search of a clear and conclusive definition of the term avyāvahārika debts have gone in vain? An examination of our above findings might throw some light on this problem. It is proposed to start in reverse order.

Now, the fact of the popular understanding of the word avyāvahārika can be proved only by talking to the people and, therefore, we have to resort to the next best method available to us. Here are a couple of examples, taken from the Marāṭhī language.

(a) A publisher writes, "Shri Ranjit Desāi kahāṇī sāṅgū lāgale, āṇi māzyā vyāvahārika choukaṭi āpoāpa kadhī gaḷūna paḍalyā, malā samajale nāhī. Vyavahārāchā vichāra nāhisā zhālā."[2] That is to say, '(when) Shri Ranjit Desai began to tell the story, I did not even realise when I lost 'business-man' in me (or my usual attitude as a businessman). The thought of business disappeared.'

(b) In the preface the author of the book describes, "Shivāji dhārmic hotā, paṇa dharmabhoḷā navhatā. Vyavahārī hotā, paṇa dheyaśūnya navhatā."[3] This means, 'Shivāji was religious, but not a blind follower of it. He was practical, but not without ideals.' This is how the term figures in Marāṭhī. Also, in a sense, the above examples, though chosen at random, clearly indicate by implication, what is 'proper'

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1. It might be because of the difficulty of defining it on one hand, or its being a living word on the other, the modern jurists and scholars have, in their translations of the word, left it in its original form.
2. R.Desai, Shrīmān Yogī, Vol.I, (Poona, 1968), p.1o, here, the publisher, R.J.Deshmukh, is telling how he came to make up his mind to publish this work.
3. Ibid., p.14, also on the same page, the author uses the word vyavahāra in compound rājavyavahārakośa.

or 'improper' in the circumstances: Thus, in (a) even altruistic attitude on his part has been considered by a businessman (the publisher) as a proper one in the circumstances, though normally he would have preferred to be more businesslike than altruistic; similarly, while describing Shavaji's character in (b) it is shown that it is good to be a practical man but at the same time it is improper to become completely unprincipled. Thus, the term almost certainly seems to convey a sense of the 'propriety' of an act, mental or actual. And looked at from this point of view and its present-day common use in a number of modern Indian languages, it appears that as commonly understood the word vyāvahārika has a contemporary, conventional sense of 'righteousness', a kind of indicator which points to the prevalent norm representing good values of human behaviour. Perhaps this is why most of the commentators and scholars have glossed it "righteous", and "proper" etc.

It is respectfully submitted that in Marāṭhī, as in other Indian languages, any average person would have hardly any difficulty at all in understanding these variations of the meaning conveyed by the use of the word vyāvahārika in similar contexts. In fact, the context in which the word is used seems to determine its appropriate meaning.

This view may be explained further with reference to our second observation (see p.166). We have stated there that none of the dictionaries referred to there have enumerated saurikam ityarthaḥ or kutumbopayogītyarthaḥ etc. as a meaning of the word avyāvahārika.[1] It is also true that these dictionaries do not include the words 'righteous' or 'proper' as possible meanings of vyāvahārika. Though the number of dictionaries referred to here may be incomplete, those referred to do exclude all these words from their enumerations. And

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1. See M.Monier-Williams, cit.above, p.112; V.S.Apte, cit.above, p.272; R.C.Pathak, cit.above, p.79; K.Prasad, cit.above, p.114; J.T.Molesworth, cit.above, p.52.

yet quite a few commentators and scholars, as we have seen above (pp.161-164), do attribute these meanings to the term avyāvahārika. Why?

The answer to this question lies, perhaps, in the implied rather than literal meaning of these renderings which alone are enumerated in these dictionaries. What do we really mean by these words: 'custom or common practice', for example? A custom or common practice, speaking generally, will have some reference, it would appear, to the benefit of the society as a whole, otherwise it would not so be regarded. Likewise, the word vyavahāra, apart from its obvious association with a law-court in any dharmaśāstric text, seems to convey 'something in the interest of all concerned', something good, 'good' in the sense of 'moral' or 'legal' values as accepted by the contemporary society[1] as a whole. Thus, (i) the debts incurred for spirituous liquors have been regarded almost unanimously by the śāstrakāras and others[3] (see above page 162) as 'bad[4] debts'. (ii) Vyavahārabahiṣkṛam is further explained as balātkārādi-kāritam i.e., 'that which was caused to be entered into under compulsion (see above p.162). But compulsion of what? An invalid or dubious transaction in which the apparent validity is vitiated by undue influence, force, fraud, or the like.

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1. Jagannātha's explanation (see p.163) appears to suggest this view when he explains the term thus, "consistent with the prescriptive usage of good men" (śiṣṭācārāviruddham)
2. Manu, VIII.159; Yājñ., II.47; Kauṭ., 3.16.9; vasiṣṭha, XV.31; Bṛhaspati, XI.51; Nārada, IV.1o; Kātyāyana, 554.
3. Aparārka, cit.above, p.648; Medhātīthi on Manu, VIII.159; vide G.Jha, trans., cit.above, vol.IV, pt.I, p.2o1-3; The Mit.on Yājñ., II.47, see J.R.Gharpure, cit.above, p.6o
4. The expression 'bad' is here used in the sense that such debts as these are deprecated by the śāstrakāras.

(iii) We also know that according to the śāstras[1] the debt incurred for the purpose of the family is a 'proper' debt, the converse of which na kuṭumbopayogītyarthaḥ may be a 'bad' debt or 'improper' debt. Similarly, (iv) a debt incurred for na nyāyam ityarthaḥ i.e., for 'unrighteous' or 'improper' cause is a 'bad' debt. Now, in this sense, though described differently, all these debts have, it seems, one thing in common in that they are śāstrically considered as against 'righteousness' or vyavahāra (and hence deprecated). Thus the word vyāvahārika has reference to 'something good', 'something proper'.

Besides, we may be right in our understanding that the various terms, used above by these commentators to denote na vyāvahārikam, were in fact used by way of an illustration to show the impropriety of these kinds of debts, the taint of which makes them avyāvahārika debts.

This explanation seems to carry even greater weight if we refer to the arthaśāstra view[2] on this subject, as we shall immediately (p. 171 ff).

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1. " --- even one person, who is capable, may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family require it or the support of the family render it necessary or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." The Mitākṣarā, I.i.28-9, quoted by J.D.M. Derrett, I.M.H.L., cited above, p.266;
"Kuṭumbārtha, aśaktena --- ", 'when unable to maintain the family' (a debt incurred to meet this situation must be paid) Kātyā. 542, vide P.V.Kane, ed.& trans., Kātyāyan-smṛti, cit.above, pp.68,225; also see Kātyā. 545; Yājñ. II.45; Aparārka, cited above, p.647; The Vivāda-ratnākara, cited above, p.56.

2. Kauṭ.,3.16.3; vide R.P.Kangle, ed.& trans., cited above, pt.II, p.281, see f.n.3 where Kangle states "sarvasvam etc. these are the avyāvahārika gifts." He is probably right here when he treats these i.e. sarvasvam, putradaramātmānam ---- (see his pt.I,p.121) are illustrations of gifts that are avyāvahārika, i.e., ought not to be admitted to legal effect; and therefore, voidable or revocable.

footnote continued next page)

This inquiry, therefore, leads us to believe that, though these terms, i.e. saurikam ityarthah and na kutumbopayogītyarthah do not appear in the dictionaries as meanings of the term avyāvahārika (see p.168, f.n.1), by implication they appear to illustrate its real meaning as commonly understood and explained above, i.e., 'improper' according to śāstras, (see p. 168). This might be the reason why the commentaries used them to explain the term na vyāvahārikam.

We have tried to clarify, so far, the meaning of the term avyāvahārika as it has been expounded by the dharmaśāstras. Let us see what the arthaśāstra has to tell us in this respect.

The Arthaśāstra View: Kauṭilya[1] seems to have explained revocable gifts and debts in the same section[2] (3.16.1-9) thus dattam avyavahāryam ekatrānuśaye varteta [3] which

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f.n. continued from last page) cf. Bṛhaspati, XV.2,
"sāmānyam putradārādhisarvvasvanyāsayācitam /
pratiśrutam tathānyasya na deyantvaṣṭadhā smṛtam //"
quoted in the Vivāda-ratnākara, cit.above, p.127, the translation of which is "That which may not be given is declared to be of eight sorts, joint property, a son, a wife, a pledge, one's entire wealth, a deposit, what has been borrowed for use, and what has been promised to another." Vide J.Jolly, trans., S.B.E.33, cit.above, p.342. G.Jha, trans., the Vivāda-cintāmaṇi, cit.above, p.57. Also, see Nārada, IV.4-5, "A Bailment for delivery, an article borrowed for a special occasion, a pledge, common property, deposit, son and wife and the entire property when there is progeny, --- and also what has been promised to another, --- these the teachers have declared to be what should not be given away, even under distressful circumstances." Vide, G.Jha, ibid., p.58; also see, J.Jolly, ibid., p.128.
Also, Yājñ., II.175, "svam kutumbāvirodhena deyam dārasutādṛte / nānvaye sati sarvasvam yaccānyasmai pratiśrutam " //, vide, Aparārka, cited above, p.779; which means, 'Only such things may be given away as do not injure one's own family, the wife and the son being always excepted; the entire property also should not be given away, if there is progeny; nor should one give what has been promised to another person.'

1. Kauṭ., 3.16.1, R.P.Kangle, cit.above, pt.II, p.281.
2. Chapter, 16,sec.68, ibid.
3. Kauṭ., 3.16.2, R.P.Kangle, ed., cit.above, pt.I, p.121, also see, Dharmakośa, cit.above, p.794.

Kangle translates as, "A gift, not negotiable, shall remain in revocation in one place."[1] This translation appears meaningless. It is literal, perhaps, because it has not been properly understood.

J.J.Meyer[2] translates, "Anything given (presented), which is not negotiable, i.e., not marketable, belongs solely and alone to 'withdrawal' (i.e. the chapter dealing with Rescissions of Sale and Purchase).

R.Shamashastry's[3] translation is, "Invalid gifts shall be kept in the safe custody of some persons."

T.Ganapati Sastri's commentary (Trivandrum edn., II, p.94) reads, dattam avyavahāryam ityādi. vāgdattam vyavahārāyogyam ced, ekatra anuśaye varteta, anuśaye eva kevale varteta. na tva anuśayāt kadāpi mucyetetyarthaḥ. This means, "Assuming that, e.g., oral gifts are not legally effective they are subject to unilateral rescision, that is, are subject to mere rescission. They can never be released, or freed, (from the possibility of) rescission." This has the merit of making sense; (whereas Shamashastry's translation ignores that anuśaya has the special sense required in the immediately preceeding chapter. No doubt Kangle is right in observing that, at any rate.) It is suggested, however, that the correct translation of Kauṭ.3.16.2 seems to be, A gift if incapable of legal effect[5] remains subject to unilateral rescission (repudiation). In other words, according to the arthaśāstra, the meaning of the word avyavahāryam (and here it applies to gifts as well as debts) appears to be 'void' or 'voidable' in law.

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1. R.P.Kangle, cit.above, p.281.
2. Das Altindische Buch vom Welt- und Staatsleben, Das Arthaśāstra des Kauṭilya by J.J.Meyer, (1926), pp.297-98.
3. R.Shamashastry, Kautilya's Arthaśāstra,(Bangalore, 1915), p.239.
4. Also, see Dharmakośa, cited above, p.795.
5. It appears that the renderings of J.D.M.Derret and J.R. Gharpure (see p.164) agree with the arthaśāstra's interpretation of the word avyāvahāryam.

What, then is the import of the term avyāvahārika debt? From the above investigation, it appears that:

(a) according to the dharmaśāstra, the meaning of the term seems to be 'improper', judged from the point of view of the contemporary conventional sense of righteousness, i.e., that which is consistent with the prescriptive usage of good men. Accordingly, the term may be applicable to various situations that are deprecated by the śāstras, depending on the circumstances of every case; and

(b) the arthaśāstra seems to agree, in principle, with the view of the dharmaśāstra, following it to its logical conclusion when it treats the term avyāvahāryam as void or voidable in law.

IV.3 THE SCOPE OF AVYĀVAHĀRIKA DEBTS

i) We have already noticed above that the Smṛticandrikā and Vīramitrodaya (Vyavahāra-Prakāśa), while explaining the term avyāvahārika, seem to have equated it with at least one of the clearly enumerated kinds of debts, i.e., saurikam. Accordingly, saurikam is within avyāvahārika. Does this mean that the latter represents all the remaining specified kinds of debts that are excepted by the smṛtis? Logically it will appear so, because none of them, speaking generally, appears to fit into what the śāstras[1] would consider vyāvahārika.

ii) Secondly, one suspects that Uśanas and Vyāsa really intended to convey this sense by the use of this term. The reason for this assumption is obvious. All śāstrakāras who have written on this subject have specifically mentioned certain debts[2] which the sons need not pay. But these two

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1. See Mitākṣarā, I.i.28-9; Kātyā., 545; Yājñ., II.45; etc. cit.above, in f.n. 1 on p.17o;
2. For example, Bṛhaspati, XI.51, "saurākṣikam vṛthādānam kāmakrodhapratiśrutam / prātibhāvyam daṇḍaśulkaśeṣam putrān na dāpayet // vide here from the Vīramitrodaya, cit.above, p.468; also, Manu,VIII.159; Yājñ.II.47; Kauṭ., 3.16.9 etc.

have, in this context, listed only daṇḍa and śulka (which are indeed included in the others' enumerations) and 'any debt which is not vyāvahārikam (see p.16c). Now, though the enumerations of the rest are not exactly identical, they are remarkably similar. Thus, in the similar context, one is inclined to think that the phrase 'any debt which is not vyāvahārikam' might represent the specified debts at least.

iii) Besides, the arthaśāstra clearly treats all these various heads of debts[1] under the same section (see p.171, f.n.2), which deals with'avyāvahārika gifts and debts'. It is suggested, therefore, that the term avyāvahārika may be taken ejusdem generis with the enumerated debts.

In conclusion, it may be stated that the term avyāvahārika debts seems to mean, according to both the dharmaśāstra and arthaśāstra, debts improper in a particular context, whether moral or legal, and hence void or voidable; but due to the nature of the term, every case has to be judged on its own merits. Moreover, if avyāvahārika is to be taken ejusdem generis with the enumerated debts, sons cannot be made to pay any debts which the śāstra refused to recognise.

Of course, ideas of morality change, and they change not only with time but also with place. And, in a country like India, where there still remain different standards of morality for different groups of people in the society, and where thousands of miles lie between the southern and northern, eastern and western borders of the country, one needs little imagination to grasp the scope for the multiplicity of moral standards. On the other hand there is the problem of sorting out the illegalities. Laws change too. What sort of illegality matters in the Hindu law of tainted debts - civil or criminal - and at which stage? Then, regarding the degrees of illegality

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1. Kauṭ., 3.16.1-9; R.P.Kangle, cit.above, p.281. (especially, 3.16.9 which enlists specific debts that need not be paid by the sons or other heirs).

and immorality: where should one start and stop, in the process of determination of 'taint' or otherwise, in respect of a debt? These and similar other questions that we face due to the complexities of modern life will have to be dealt with (see below chapter VI and VII).

P A R T T W O

THE DOCTRINE OF 'TAINTED' DEBTS UNDER MODERN HINDU LAW

CHAPTER V

SOME FOREIGN LEGAL CONCEPTS AND MODERN HINDU LAW OF 'TAINTED' DEBTS

V.1 INTRODUCTION

We need not go into the details[1] of the creation of modern Hindu Law. We are concerned with the doctrine of 'tainted debts', and therefore our object should be to deal only with those questions which might affect this doctrine.

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1. For the details see, J.D.M.Derrett, R.L.S.I., cit.above, pp.229-25o; J.D.Mayne, cit.above, (1878 edn.), pp.3o-32; and its preface; R.Lingat, cit.above, pp.136-142;
H.S.Maine, Village Communities in the East and West, (London, 1871), pp.36ff;
M.P.Jain, Outlines of Indian Legal History, (Bombay, 1972), pp.582 ff;
The letter of Sir W.Jones, dated 19/3/1788, quoted by H.T.Colebrooke, Digest, vol.I, cited above, preface pp.V-X;
A.Steele, The Law and Custom of Hindoo Castes, new edn.; (London, 1868), preface. Besides, the prefaces of the following books throw light on this subject:
W.H.Macnaghten, Principles and precedents of Hindu Law, vol.I, (Cal., 1829);
F.W.Macnaghten, Considerations on Hindoo Law, (Serampore 1824);
J.H.Nelson, A View of Hindu Law, (Mad./Cal./Bombay, 1877). Also, A Prospectus of the Scientific Study of the Hindu Law, (London, 1881);
S.G.Grady, ed., Institutes of Hindu Law, 3rd edn., (London, 1869), see preface to original translation by Sir W.Jones of Laws of Manu;
W.Stokes, The Anglo Indian Codes, vol.I, (Oxford, 1887),
H.S. Cunningham, A Digest of Hindu Law, (Mad., 1887),
W.H. Macnaghten, Principles of Hindu and Mohammadan Law, 2nd edn., (Lond./Edinburg, 1862);
Also, J.D.M.Derrett on J.H.Nelson, at C.H.Philips, ed., Historians of India, Pakistan and Ceylon, (London, 1961), pp.354-372;
A.Gledhill, 'The Influence of Common Law and Equity on Hindu Law since 18oo', (1954) 3 International and Comparative Law Quarterly, pp.576 ff.,
V.Ramaswami, 'Hindu Law and English Judges', at (196o) S.C.J., p.225 ff.

What did the British administrators in India understand by this doctrine? Did they differ from its original exponents or their commentators? To answer these and related questions, we will have to investigate and examine the case law. But first let us take a very brief glance at their initial problems in administering Hindu law, and then see whether they had any notions from their own legal system similar to those of Hindu law on the point concerned which might have come to their aid, and in the process might have influenced those of Hindu law.

V.2 INITIAL PROBLEMS FACED BY THE BRITISH JUDGES

Since[1] the British undertook administration of Hindu law, they had to face, first, the problem of the language of the śāstras from which the Hindu law is derived. To mitigate this difficulty, a few, like W.Jones and H.T.Colebrooke, learned Sanskrit and undertook translations of Sanskrit treatises into English. In the meantime, native experts, called paṇḍits, were employed to assist the judges. In this way between the end of the 18th century and 1864 Hindu law was not judicially known to the judges[2]. They took from the paṇḍits[3] the law governing any case to which Hindu law applied. In the course of time, however, it was realised that the paṇḍits were not entirely reliable[4] - or so it seemed, at least.

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1. J.D.M.Derrett on J.H.Nelson, op.cit., p.365, n.34; W.H.Macnagthen, Principles, op.cit., preface, pp.V.XIII.
2. Note the remarks of the Court in 1861 to the effect that, "the chief authorities in Mithila law have not been rendered available, by being translated into English, to the judges unlearned in Sanskrit language, and that we are thus, many of us at least, unable from our own scrutiny of the text to ascertain and vouch for the accuracy of the law as laid down by our predecessors in the court".; Musst.Junnuk Kishoree v.Baboo Raghunundun Sing, (1861); S.D.A. Rep., 213, 218.
3. A.Gledhill, op.cit., p.576.
4. W.Jones, q.H.T.Colebrooke, op.cit., p.VI; J.D.Mayne, op.cit., pp.3o-31.

Moreover, as increased knowledge became available through discovery and translations of various śāstric texts, it became clear that different interpretations are given of original text books by different commentators, and that, among these, writers of particular tenets are held as authorities in different provinces of India[1]. The law which the English found in India was, therefore, not of a nature to bear the strict criteria applied by English lawyers[2]. It resembled the conglomeration of civil and canon law sources available to contemporary doctors in Doctors' Commons[3] very much more closely than even the most chaotic material actually applied then in the courts of King's Bench and the Common Pleas and other Common law courts. In addition, mistakes in the few available translations, as well as misunderstandings either did, or were feared to complicate matters further.

Though the choice of law was made from the śāstric authorities, the procedure applied in the administration was, after the first Civil Procedure Code, uniformly as imported from Westminster. The legal system, developed from this combination, imposed a degree of rigidity and uniformity upon Hindu law, which it had not known earlier[4]. The whole administration of Hindu law of this period has been described by J.D.Mayne, who said, "It was as if a German were to administer English law from the resources of a library furnished with Fleta, Glanville and Bracton, and terminating with Lord Coke"[5]. Though this is not accurate, as Hindu

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1. A.Steele, op.cit., pp.VII-VIII.
2. H.S.Maine, op.cit., p.37.
3. For a rapid picture of the sources available in the law of marriage and inheritance, see J.D.M.Derrett, Henry Swinburne ... (York, 1973). On Doctors' Commons the recent work of Squibb was not available to me.
4. A.Gledhill, op.cit., pp.577-78; H.S.Maine, op.cit., pp.44-45; J.D.Mayne, op.cit., p.31.
5. Ibid.

treatises written after 1800 were available to the pandits, and a few scholars able to read Sanskrit[1], the criticism has its points and the consequences of the situation were probably inevitable. The precepts of the śāstra[2] were mistaken for principles of law. The whole system appears to have been misjudged by scholars as well as lawyers and judges.

According to J.D.M.Derrett[3], "It is clear that the British (mistaking the śāstra for a system akin to Canon Law, as they knew it) made this mistake" and it is the analogy with Canon Law, which by 1770 was known to lawyers in London very much as a system of principles rather than precepts, which is crucial to this story.

In these circumstances, obviously, the influence of certain concepts of English law, in its wider perspectives, upon the native law was inevitable. Let us turn to those concepts.

V.3 ENGLISH LAW REGARDING PAYMENT OF THE ANCESTOR'S OR TESTATOR'S DEBTS

We turn first to the English judges' knowledge in respect of law relating to debt-liability, particularly for debts not one's own. How did the English law treat problems relating to the repayment of debts of a deceased?

We know that in Hindu law it is the son who is generally held liable for his father's debts from a very early time. According to the Canon Law the heir is bound to pay debts of

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1. J.D.M.Derrett, R.L.S.I., op.cit., chapter 8
2. Cf. "These are not simple recommendations which wisdom would tender, or rules of equity that ought to be obeyed. The rule of dharma retains its peculiar quality even when it involves judicial consequences. Its authority resides essentially in the faith of the Hindu in a divine regulation of the world, the law of which is expressed by that rule." R. Lingat, op.cit., pp.135-36.
3. Dharmasastra and Judicial Literature, cit.above, p.4.

the deceased arising out of delict (which includes tort and crime), but at Roman Law he was obliged to pay those arising out of a contract etc., and those arising out of delict only to the extent that the deceased's goods reached him and only when suit was commenced in the debtor's/accused's life time[1].

Thus, there the liability to pay debts has some reference to inheritance[2]. The English position at the beginning of the 16th century, as has been explained by C.St.Germain[3], appears to be slightly different.

In those days, it seems, privity of blood[4] between the ancestor and his heir was necessary for inheritance, though

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1. Gloss of Bernardus on Decretales Gregorii IX, Book III, tit. XXVIII, cap. 14 and vers. 'sed eius haeredes'.

2. For implications of various kinds of succession in relation to debt liabilities see, R.Sohm, The Institutes (of Roman Law), vide J.C.Ledlie, trans., 3rd edn., (1907), p.505; H.F. Jolowicz, Historical Introduction to the Study of the Roman Law, 2nd edn., (1952), pp.131-132.

3. The author of The Doctor and Student, first published in c. 1523, is highly regarded. It is said about him that his "studies in the Common Law, and his knowledge of English law, naturally led him to interest himself in the development of equity, which upto this time, had been closely connected with the Canon Law, because it had been mainly developed by the ecclesiastical chancellors. He was able to look critically the rules of English law, and, with the help of his knowledge of the Canon Law, to point to those parts of it which needed the help of equity if it was to fulfil the main object of law - the furtherance of justice and the promotion of virtue."
W.S. Holdsworth, A History of English Law, vol.V, (1st published, 1924), pp.266-67.

4. C. St.Germain, Two Dialogues in English between a Doctor and a Student, Dialogue II, (London, 1687 edn.), p.318, or see p.261 of edn. (Cincinnati, 1874) of the same: Regarding 'Heir', "that he shall have advantage by the same ancestor ... for the privity of blood that is between them" ... etc. But "he must be of the whole blood, not a bastard, alien"; vide M.Bacon, A New Abridgement of the Law, vol.IV, (7th edn., 1832), p.155(m). As regards the concept of "Heres" (in Roman Law), which is different from that of "Heir" in English law, it should be noted that "In the language of English jurisprudence, Heir denotes a successor to real estate, while Excecutor, the notion of which is derived to some extend from Roman law, denotes a successor appointed to succeed to personal property. Again, Heir denotes a successor to real estate in case of intestacy. Devisee denotes a successor to real estate under a will"; vide, E.Poste, trans.& comm., Instiutes of Roman Law by Gaius, 4th edn., (Oxford, 1904), p.187.

"the son and heir hath no power over the inheritance during the life of the ancestor"[1]. So far as the heir's liability to pay his father's or ancestor's debts is concerned, generally this holds only if he received assets[2] from the deceased ancestor. It is not personal and is limited to the extent of the assets[3]. However, it is suggested in respect of contractual liabilities, in conscience, the liability which arose due to clearest cause of debt should be attended to first, and then, among the debts of like cause, the one which bears most need and greatest charity[4]. Here it would seem that the principles of morality and righteousness, as well as

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1. M.Bacon, op.cit., p.155. There is an exception to this rule in the case of the Duchy of Cornwall. Ibid, p.154.

2. "If the father bind him and his heirs to the payment of a debt, and die, in that case the son shall not be bound to pay the debt, unless he have assets by descent from his father." C. St.Germain, op.cit., (1687 edn.), p.319; or (1874 edn.), p.261.
   It may be noted, however, that in the case where, "one seised in fee mortgages to A and afterwards binds himself and his heirs by bond to A and dies; if the heir comes to redeem this mortgage, he must pay the bond debt as well as the mortgage, but if the heir assigns the equity of redumption to J.S. who brings his bill to redeem, he shall pay the mortgage only, and not the bond." Coleman v.Winch, (1721) 1 P.WMS. 775.
   Apparently, the heir in this case suffers disadvantage, in lieu of his inheritance.

3. "But the body of the heir is protected, for it would be most unreasonable to subject the heir to the payment of his ancestor's debt, any farther than the value of the assets descended." Vide, M.Bacon, op.cit., p.164; also, "But now the heir is liable at law for the value of the assets he has aliened ", per Lord Macclesfield in the Coleman's case, op.cit., at p.777; also see Luson's Case, 1 DYER, 81a.

4. C. St.Germain, op.cit., (1874 edn.), p.131.

necessities of life and charitable deeds of the deceased have been taken into consideration while giving preference to certain debts over other debts. According to the Canon Law, the benefit of the soul of the testator also has to be considered[1]. But, at the common law, he who comes first will take first[2].

Where, however, the liability involves a tort or arises ex delicto, generally the maxim 'Actio personalis moritur cum persona' applies, and neither the executor nor heir is compellable by law to make amends[3]. So far as Equity is concerned, assets permitting, the executor may meet such obligations, provided he has already paid all legacies etc., though charitable gifts may have been left out[4]. On the other hand it is also said, "that the son shall not bear the wickedness of the father , i.e., understood spiritually. But as to temporal goods, the opinion of the doctors is,

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1. While speaking about the discretionary powers of the Executors, it is said, "that the authority to make executors, and that they shall dispose the goods for the testator, is by the custom of this realm: but then, I think, as thou sayest, that by the law of God they shall be bound to do the first, that is, to the most profit of the soul of their testator". - C.St.Germain, ibid., p.13o.
   However, this liability, too, was limited to the extent of the testator's goods. - Vide, T.Wentworth, The Office and Duty of Executors, (London, 1774 edn.), p.155.
2. C. St.Germain, op.cit., (1874 edn.), pp.13o-131.
3. "Although executors do represent the persons of their testators; yet if the testator commit any trespass upon the goods of another, or upon his person or lands, no action lieth for this against the executor; for 'actio personalis moritur cum persona'." - Vide, T.Wentworth, op.cit., p.127.
   Hence, "Debt for an escape will not lie against the heir of the gaoler"; per Luson's case, op.cit.. Cf. "Debt does not lie against the executors of the warden, for suffering one in execution to escape from the fleet, unless the warden was convicted in his life time". Whitacres v.Onsley, 3 DYER, 322b.. It should be noted here that, "this maxim not being generally true, but liable to many exceptions, leaves the law undefined as to the kind of personal actions die with the person or survive against the executor."
   - Vide, C. St.Germain, op.cit., (1874 edn.), p.128, n.
4. Ibid.

that the son sometime may bear the offence of his father[1]".

The position of the English, i.e., secular, law as at c. 1775, (when the British were about to involve themselves seriously in the administration of justice in India), may be stated in the words of Lord Mansfield, who, while delivering the unanimous opinion of the Court in the case of Hambly v.Trott[2], said:

> "Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour, or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, as arises ex delicto (as is said in Sir T.Raym. 57, Hale v.Blandford,) supposed to be by force and against the King's peace, there the action dies; as battery, false imprisonment, trespass, words,nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many other cases of the like kind."[3]

Thus, it would appear that where prima facie the cause of action arises ex delicto, i.e., from any of the public or private criminal injuries or wrongs, as stated by his Lordship, all such actions are buried with the offender. It must also be remembered that by this period the administration of estates had passed for practical purposes to the courts of Equity and the testamentary jurisdiction of the Ecclesiastical courts had withered.

To sum up, it may be deduced from this discussion that the liability to pay debts not one's own survives, generally, only to the extent of the deceased's own assets left behind him. A number of personal obligations die with the person. As regards surviving liabilities both courts of law and Equity seem, in an attempt to do justice and promote virtue, to have

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1. Ibid, p.262; The argument goes like this: - If he (son or heir) receives benefit from his ancestor then, in some cases at least, it is not unreasonable for him to suffer some disadvantage for the same ancestor. Ibid, p.261.
2. (1776) 1 COWP. 371
3. Ibid, at p.375

paid conscious attention to matters of law as well as those of conscience. The executor or heir has no personal liability for debts of the deceased.

V.4 THE CONCEPT OF 'BENEFIT OF THE SOUL'

To the English judges in India the idea of a relationship between a person's debt liability and his spiritual happiness was not completely new; nor was it unknown to them that religion and its institutions[1] had extended a considerable influence on the development of law relating to recovery of debts in their own country. We find, in respect of proving testaments, that

> "the reason why spiritual men have the proving of testaments is, because it is to be intended; that the spiritual men have better consciences then lay men, and that they have more knowledge what thing is more for the profit, and benefit of the soule of the testator, then lay men have; and that they will looke more then lay men, that the debts of the deceased be paid and satisfied out of his goods, and that they will see his will[2] performed so far as his goods will extend, etc."[3]

It would appear from this passage that the emphasis, at least nominally, lies clearly on the benefit of the soul of the deceased testator, and that, in this respect, the payment

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1. "The interest which from very early times the Church claimed in the moveable or personal property of deceased person is best explained by its teaching that the first and the best destination of a dead man's goods was to purchase masses for his soul and out of this view of the proper objects of wealth the whole testamentary and intestate jurisdiction of the Ecclesiastical Courts appears to have grown." Vide, H.S.Maine, The Early History of Institutions, 7th edn., (London, 1897), p.332.
2. P.V.Kane seems to detect 'germs of idea of will' even in Hindu law, see his Kātyāyana-smṛti, ed.& trans., cit.above, p.234, n.566.
3. J.Perkins, A Profitable Booke, (London, 1642), p.213; or see its 15th edn., (London, 1827), p.94, sec.486. (The 1st edition of this book, which treats the laws of England, seems to have appeared in c. 1528.)

of his temporal debts held an important place in view of the Ecclesiastical Courts; and that the liability is to be pursued to the extent of his assets. That there is a definite link between the payment of debts of the deceased and his spiritual welfare appears to have been confirmed by the same author, while explaining why the deceased's debts should have priority over his assets as against his legacies etc.. Thus he says.

> "And although a man devise a chattel real or personal by his will, yet the executors are bound in law to pay the debts of the deceased before they pay or deliver any legacies. And therefore the common law of the realm is, that the devisees of chattel real or personal cannot enter upon the legacies, nor take them without the assignment or delivery of the executors, or by their assent, or without the assignment or delivery or assent of one of them; and the reason is, because the soul of the testator shall not be in danger for the nonpayment of his debts, etc.."[1]

Moreover, it was on the basis of the principle and for the purpose of fulfilling the wishes of the deceased, that it was enacted[2] that an alienation of the deceased's assets made by even one of the executors "shall be as good and effectual in the law"[3] as if it was made by all the executors. It should be noted, however, that any act on the part of the deceased, which was intended to defeat the bona fide claims of his creditors, was severely deprecated[4], and in law it has

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1. Ibid, (15th edn.,) p.94, sec. 488; or p.214 (of 1642 edn.)
2. 21 Hen. 8. c.4; vide here Richard Burn, The Ecclesiastical Law, vol.IV, (8th edn., 1824), pp.33o-332.
3. Ibid., p.332; also E.V.Williams, A Treatise on the Law of Executors and Administrators, vol.II, (8th edn., 1879), pt.III, book 1, p.95o; A.Thomson, A Compendium of Modern Equity, (London, 1899), p.211.
4. "By a constitution of Archbishop Stratford, all who shall give away or alienate their goods upon their death-beds, to defeat their creditors, to their wives and children; and all who shall counsel the same, or assist therein, or receive the said goods; shall incur the penalty of the greater excommunication: and the giver shall not have Christian burial." (Lind.161); see R.Burn, op. cit., p.332.

considered as a fraudulent deed, and hence void and of no effect[1]. Any explanation that could be advanced to justify this refusal to respect such fraudulent wishes of the deceased is likely to have its basis in some moral principles. It may, therefore, be concluded that the principles governing this branch of English law have their roots in religion as well as morality. The wishes of the deceased were to be honoured for the benefit of his soul, i.e., provided they were morally acceptable. Thus, the development of the law on this subject seems to have proceeded along this kind of reasoning.

The application of these principles to practical problems, however, produced certain curious results. It appears that while ascertaining the real intention of the testator the Courts of Equity developed a tendency (advantageous to their own jurisdiction) according to which wills seem to have been construed so as to charge real estate, by implication for the benefit of creditors; (such implication, however, may be afterwards destroyed[2]). The justification for such construction seems to come from the court's desire so to construe wills 'for the benefit of creditors, and that men should not sin in their graves[3]'. The date (1751) should be noted. It was only sixteen years before the East India Company acquired responsibility for civil justice throughout Bengal, Bihar and Orissa. In a later case[4], (as in the above referred to), the question to be determined by Lyndhurst, L.C., was 'Whether this will constitutes a charge upon the testator's real estate for the payment of his debts.' As far as the facts were concerned, the material part of the will commenced with these

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1. "For the avoiding of fraudulent deeds, ... it is enacted, that every such deed or conveyance shall (as against such creditors) be void and of none effect." (13 El.c.5); ibid.
2. Thomas v.Britnell, (1751), 2 Ves.Sen. 313, 315.
3. So observed Sir John Strange, ibid., p.314.
4. Price v. North, (1841), I Phillips. Ch. 85.

words: "First I will that all my just debts, funeral expenses, and the costs and charges of proving this my will be fully paid and satisfied".[1] The testator then devised all his real estate to his daughter and her issue in strict settlement; and then after giving one specific and one pecuniary legacy he gave all the residue of his personal estate (after and subject to the payment of his just debts etc.) to his said daughter. According to the Lord Chancellor,

> "The first direction in the will clearly amounts to a charge: that is admitted; but it is only a charge by implication and may therefore be rebutted, provided there be anything to be found in other parts of the will inconsistent with the supposition that such was the testator's intention".[2]

After referring to Thomas v. Britnell[3] and two other cases, he continues,

> "Now, what is here relied on for repelling the implication? It is the last clause. But when the testator bequeaths his personal estate 'after and subject to the payment of his debts', he does nothing inconsistent with an intention to charge his real estate with them also as an auxiliary fund; and therefore, such a direction cannot control the operation of the general charges Courts of Equity have always been desirous of sustaining such charges for the benefit of creditors, and the presumption in favour of them is not to be repelled by anything short of clear and manifest evidence of a contrary intention."[4]

Hence, he declared that the real estates are equitable assets instead of legal. It may be observed here that although the liability to pay debts of the deceased was originally recognised and supported mainly, among other reasons, on the grounds of 'spiritual profit or benefit of the deceased's soul', the real beneficiary emerging from the application of that principle was the creditor.

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1. Ibid.
2. Ibid., pp.86-87
3. (1751) 2 Ves. Sen.313
4. 1 Phillips, Ch. 85, 87-88 (My emphasis).

Legal effects of certain obligations of the deceased: We have noticed above (see pp.182-183) that the payment of debts of the deceased has been given priority over his other wishes such as legacies etc., and the executors are, therefore, legally bound to follow this course. But, what would be the position of an executor or administrator, assuming that he is faced with claims arising out of various kinds of obligations of the deceased?

We must first note here that any personal contracts for service of the deceased clearly die with him[1] (see pp.184-186 above). Yet it has been generally established from very early times that a personal claim, such as that on which the testator or intestate might have been sued in his life-time, survives his death, and is enforceable against his executor or administrator. It is, therefore, clear that the executors or administrators are answerable, as far as they have assets of the deceased, for debts of every description due from him, either debts of record as judgements, statutes or recognizance; or debts due on special contracts, as for rent or on bonds, covenants and the like, under seal; or debts on simple contracts, as notes unsealed and promises not in writing, either expressed or implied[2]. Thus, in general, it is the duty of the deceased's representative to perform his contracts[3]. We are told that,

> "Any voluntary bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt. Indeed, if the bond be merely voluntary, a real debt, though by simple contract only shall have the preference: But if there be no debt at all,

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1. H.G.Hanbury, Modern Equity, (5th edn., 1949), pt.IV, p.560.

2. E.V. Williams, op.cit., vol.II, pt.IV, Book II, pp.1728-29.

3. Ahmed Angullia v. Estate and Trust Agency, (1938), A.C.624, (P.C.), at p.639.
   Cf. In re Rushbrook's Will Trusts, (1948) 1 Ch.421, 424.

> then a bond, however voluntary, must be paid by an executor."[1]

Thus, a debt created on the basis of some consideration, as against the one which is based on a mere promise, is given perference; though even among such debts, a debt which is incurred by way of giving a bond 'for a wicked consideration[2], i.e., to induce a woman to live in adultery with the deceased debtor, has been held to be worse than a voluntary one'. Clearly, it would appear that in such a case as this, the reason for the postponement is the Immoral as well as illegal nature of the consideration[3], i.e., purpose.

Apart from this kind of case, it appears that if the contracts of the deceased are onerous, his executor or administrator should do the best he can for the estate by attempting to come to terms with the contractee.

> "The test is: could the contractee enforce the contract? If so, the representative must not break it. If, however, the contract was unenforceable, he is entitled, and indeed bound, to take advantage of the legal flaw that renders it so, even though it involves his taking up a line of defence from which he might in his own case, as an honourable man, have shrunk." [4]

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1. Edwards v. The Countess of Warwick, q. in Lechmere v. Carlisle (Earl of), (1733) 3 P.WMS. 211, 222; R.Burn, op. cit., p.353; also J. Story, Commentaries on Equity Jurisprudence, vol.I, (1oth edn., 187o), p.42o; and also, "A bond or covenant merely voluntary shall be postponed to to simple contract debts which are bona fide owing for valuable consideration; but such bond or covenant, if not to the prejudice of creditors, must be paid by the executor, and in preference to legacies. For a bond or covenant, however voluntary, transfers a right in the life-time of obligor; whereas legacies arise from the will, which takes effect only from the testator's death, and therefore, they ought to be postponed to a right created in life-time." Vide, E.V.Williams, A Treatise on the law of Executors and Administrators, (8th edn., 1879), pt.III, bk.II, p.1o19.
2. The Lady Cox's Case, (1734), 3 P.WMS. 339, 341.
3. For, "if such bond had been given to a lawful wife after marriage, this had been a voluntary bond, and void against creditors (ante p.222); much more, when given to one who was no wife and upon such an illicit consideration." - Ibid.
4. H.G. Hanbury, op.cit., pt. IV, p.56o.

Evidently, though legally a correct way of saving the estate of the deceased, it seems contrary to the principles of justice, equity and good conscience. Can such acts be conducive to the benefit of the soul of the deceased? It may be because of this sort of uneasiness in the minds of many, that it has even been considered that, "to plead the Statute of Limitation is unconscionable."[1]

Time-barred debts: In view of this feeling, perhaps, the Courts of Equity have taken a softer line in respect of the payment of debts barred by the Statute of Limitation. Thus, it has been laid down that,

> "if one by will subjects his lands to the payment of his debts, debts barred by the Statute of Limitation shall be paid; for they are debts in equity, and the duty remains; the Statute hath not extinguished it, though it hath taken away the remedy".[2]

In other words, though the law has prohibited the creditor's pursuing his right, it has not stopped the testator from recognising such debts, and thus bringing them out of the Statute. But if an administrator wanted to plead the Statute of Limitations, for the purpose of saving the estate of the deceased, the plea would be allowed to stand;[3] though, on the other hand, it has been said by the Lord Chancellor Hardwicke, that "no executor was compellable, either in law

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1. Observed by L.J.Cotton, in re Rownson, (1885), 29 Ch. D. 358 at p. 362 (my emphasis).

2. R.Burn, op.cit., p.358;
Also, for a similar view see H. Meggison, A Treatise of the administration of Assets in Equity, (London, 1832), p.311.

3. Stratford (Earl of) v. Blakeway, (1727) 6 Brown, 63o, 633. Reversing the decree of the Lord Chancellor, the House of Lords stated, "that the plea should stand for an answer, with liberty to except; ... and that the benefit of the plea should be saved to the appellant till the hearing of the cause".
This point is, however, considered as settled by Lord Mansfield who expresses himself thus in Trueman v.Fenton, (1777) 2 Cowp. 544, at p.548: - "Though all legal remedy

f.n. continued next page

or equity, to take advantage of the statute of limitations against a demand otherwise well founded."[1] Thus, the matter appears to have been left to the conscience or the sense of justice of the executor; and in view of this "an executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations."[2] In certain cases, however, where the debt has been declared to be barred, judicially he must not pay it; for, if he does so, he would be guilty of a devastavit.[3] Also, it would appear that in cases of collusion or fraud no one would be allowed to take benefit of this rule[4]; but there appears to be no reason why even an executor or administrator should not be allowed to retain assets for a just debt due to himself. In fact, "the right to retain has been lately confirmed."[5]

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f.n. continued from last page) may be gone, the debts are clearly not extinguished in conscience. How far have the Courts of Equity gone upon these principles? Where a man devises his estate for payment of his debts, a Court of Equity says (and a Court of Law in a case properly before them would say the same), all debts barred by the Statute of Limitations shall come in and share the benefit of the devise; because they are due in conscience: therefore, though barred by law, they shall be held to be revived and charged by the bequest." The case involved debts revived by a bankrupt, and according to him such debts were "due in conscience not withstanding he has obtained his certificate". (My empasis.)

1. Norton v. Frecker, (1737) 1 ATK. 524, 526; Fry, L.J., considered this rule as "an anomaly - a single exception and is not to be extended" - see in re Rownson's case, op.cit., pp.364-65.
2. E.V.Williams, op.cit., pt.IV, book ii, p.1810.
3. Midgley v. Midgley, (1893) 3 Ch.D.282, 307.
4. J.Story, op.cit., vol.2, P.776.
5. E.V.Williams, op.cit., pt.III, book ii, p.1053; also see, Stahlschmidt v.Lett, 1 Sm & Giff. 415; J. Story, op.cit., vol.I, p.578.

Before concluding this discussion, it may not be out of place to note the significance of the denial of an attempt to extend the exception in respect of the time - barred debts, by analogy, to an obligation, verbally undertaken in consideration of marriage: an obligation which is incapable of being enforced, because it falls within the 4th sec. of the Statute of Frauds (29 Car. 2, C.3), which provides that after the date therein mentioned no action shall be brought to charge a debt upon any agreement made upon consideration of marriage unless it is evidenced by writing. The attempt failed.[1] What is important from our point of view is the reasoning which appears to have led to this failure. Now, we have seen above that time-barred debts are otherwise good debts and existing in conscience. Is the nature, therefore, of an obligation by way of a verbal promise in consideration of marriage, identical or even similar either at law or in equity, so as to equate these two liabilities? The Court thought not.[2] Apparently, the decision seems to have relied more on technical than philosophical grounds. However, the judges might have been influenced by the argument on behalf of the plaintiff-respondent that "an executor may not pay a debt which was incurred pro turpi causa:[3] a debt tainted by moral turpitude; for such debts have, since early times,

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1. In re Rownson. Field v. White, (1885) 29 Ch.D.358.

2. Bowen, L.J., said, "and if you have a contract which is not capable of being enforced either at law or in equity, I fail to see that a contract of that sort creates a debt or liability against the estate of a testator". Ibid., p.364.

3. Ibid., p.360.

been proclaimed void.[1] How much the Court valued this argument, however, is not very clear. According to the law laid down therein, the representative of the deceased "must not pay a debt which is irrecoverable owing to the absence of writing under Section 4 of the Statute of Fraud".[2]

In conclusion, it may be stated that the British judges knew the concept or 'benefit of the soul' in relation to the deceased's debt-liability well. They used it, in early days, to justify his debt repayment, though to the extent of his assets only; thereby saving him from 'sinning in his grave'. The liability was attached to the property of the deceased. In the course of time the importance of the concept seems to have been left in the background; while the principles, developed on the basis of equity and good conscience, in the interest of justice, have come to forefront. Thus, the British judges disregarded the last will of a testator if it were to frustrate the bona fide claims of his creditors. On the other hand

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1. In the case of Robinson v.Gee, (1749) 1 Ves.Sen.251, besides various other assignments, one Samuel had given a bond upon articles to one Mrs. Hanks. The bond imported a direct assignment by the husband of his wife Mrs. Hanks (who was herself a party) to the use of Samuel, etc. and the question was whether the plaintiffs were entitled to be relieved against these claims.

   The Lord Chancellor said, "As to this question, if it can be called so, of the demands of Mrs.Hanks: it is an extraordinary case, and such as, I hope, never will be again; it is a direct assignment of his wife, and is a scandalous prostitution of the law; for the bond looks as if drawn by a lawyer ..., this is a bond ... ex turpi causa, and is infected with the turpitude of the articles; so that as to the creditors, it must be set aside: as must also the assignment and bill of sale; which are infected with the infirmity of the consideration". - at p.254.

   In another case, Winchcombe v.Bishop of Winchester and Pulleston, (1617), Hobart, 165, where simony was involved, the Court said, "All this is spoken as if this were only void against the King: but I hold it utterly void even to strangers that may take lawful advantage of it; and therefore, note the nature of the case, that is contractus ex turpi causa, and contra bonos mores, and so it is against law, and void by the statute, even between the parties". - at p.167.

2. H.G. Hanbury, op.cit., at p.560.

not all the claims were treated as of one category. These were differentiated according to their nature, having regard to their origin and purpose in view of moral as well as legal rules prevailing at the time. In short, as regards the validity of an obligation for the purpose of its enforcement, generally the Courts have given more value not to the distant spiritual benefits, but to immediate worldly considerations, though moral principles have played and are still playing their part in the process of shaping the law.

V.5 IMPORT OF THE PHRASE 'ILLEGAL OR IMMORAL'

The important phrase 'illegal or immoral' seems to come ultimately from relatively modern understandings of Roman law. On the question of validity or otherwise of the juristic acts, we find that according to Roman law,

> "Though the facts are sufficient to constitute a juristic act, the act performed is nevertheless null and void if it is either immoral or illegal. An immoral juristic act, such as a promise to pay a reward for an immoral service, is null and void in any event. An illegal juristic act is void if (as must be assumed prima facie to be the case) it is the intention of the law that the prohibited act shall be null and void. Thus, if a law absolutely prohibits certain marriages, a marriage contracted in contravention of the law is a nullity. The Romans called a law of this kind 'lex perfecta'. But the lawgiver may confine himself to visiting the prohibited act with legal disadvantages of another kind, while leaving the validity of the act untouched. That is the case, for example, with a law imposing a merely temporary prohibition on certain marriages. The Romans called a law of this kind 'lex imperfecta'. In either case the juristic act is prohibited, but whereas a lex perfecta is imperative, and is concerned with the validity of the act, a lex imperfecta is only regulative, and is concerned with the effect of the act."[1]

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1. R.Sohm, The Institutes (of Roman Law), vide here the translation of J.C.Ledlie, 3rd edn., (Oxford, 1907), p.208.
   Also see, M.Kaser, Das Römische Privatrecht, (München,1955), pp.216-218, vide here the translation of R.Dannenbring, Roman Private Law, (2nd edn., 1968), pp.51-52.

As regards illegal transactions, evasion of the law, in the sense that the words of a statute were respected but its intention evaded, was then prevented: "Such evasion of the law was prohibited, some times expressly, some times by an extensive interpretation of the prohibiting statute."[1] On the other hand, "Acts contra bonos mores (turpia) which violated the good ancestral custom (contra bonos mores), were suppressed by the jurists and the emperors. What constituted such violation of the 'boni mores' was decided", it is important to note here, "according to the moral standards of the people, not according to religious or philosophical doctrines."[2] (My emphasis.) Thus it is clear that the test seems to be accordance or otherwise with the prevalent ideas about morality at a particular time, and perhaps, in a particular region.

It will be remembered that the Ecclesiastical Courts in the case of executors and administrators, and the Chancery Courts in the case of trusts, used to derive their learning regarding debts that could not be proved, or unenforceable contracts, from Roman Law directly or indirectly. And as we have seen above (see pp.191-196), the result was that 'illegal' or 'immoral' contracts and conditions were void or voidable, but, in either event, would not be enforced. It follows that such debts could not possibly be exacted from the 'heir', i.e., in English law the executor. Also, no trustee could be compelled to pay an illegal or immoral debt; (and if he did so, he could be compelled by the legatee or beneficiary to restore the amount personally.[3]) It is in this sense that the phrase 'illegal or immoral' was understood in English law even

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1. Ibid., p.51.
2. Ibid.
3. "An executor or administrator who has wasted or misapplied the assets of his testator or intestate is personally liable to make good the loss thereby occasioned." Vide, A.Thomson, op.cit., p.211.

before it was introduced to describe certain kinds of debts in Hindu law.

It may be noted, however, that " the drafting of Roman leges lacked the particularity of that of English Statutes."[1] Apart from English law, the terms 'illegal' and 'immoral' have also been used in other modern laws, such as French law and German law, in the context of prohibited contracts. Briefly, in these days,

> " English law takes the hardest attitude toward contracts violating a legal provision, refusing to permit intervention by the courts even where the violation is of a trifling sort. French law takes a less severe attitude,generally permitting mutual restitution of performances where the contract is void. German law has developed the most flexible approach, partly by considering the purpose of the prohibitions - and as a result maintaining the validity of some of them - partly by introducing the concept of'pending invalidity'."[2]

However, the same author continues, " Legal prohibitions in the field of contract are on the increase, and a too narrow and severe interpretation of their effect may bring about inequitable results,"[3] and advises further investigation of how other legal systems deal with these problems.

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1. J.A.C. Thomas, Textbook of Roman Law,(Amsterdam, New York, Oxford, 1976), p. 246, f.n.72.

   For further information as regards the refinement that has taken place in respect of the application of the terms 'illegal' and 'immoral' in modern English law, reference may fruitfully be made to J.C. Smith and J.A.C. Thomas, A Casebook on Contracts, 6th edn., (London, 1977), pp.531-580.

2. C. Szladits, ' Illegality of Prohibited Contracts: Comparative Aspects,' at XXth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E. Yntema, (Leyden, 1961), pp.221-231, at p.231.

3. Ibid.

Whatever the distinctions between actions brought by a party to an illegal and/or immoral contract and actions brought by a third party interested in the subject-matter of the contract, all the learning, older and more modern, on this subject attaches to the defect in contractual capacity of the contracting parties themselves. In our subject the father's debt might or might not have been exigible from him personally during his lifetime, yet it might be avyāvahārika as regards his sons. We are therefore (vocabulary apart) in a different arena of thought when we come to the pious obligation. The theme cannot properly be pursued here because we have no evidence which debts would be unenforcible against the father in traditional Hindu law on grounds of immorality or illegality, for the fact that avyāvahārika is specially mentioned in our śāstric texts strongly suggests an independent criterion.

We may turn now to the last of the concepts under discussion : the doctrine of antecedency.

V.6 THE DOCTRINE OF ANTECEDENT DEBTS

(A) The origin, meaning and the scope:

(i) The origin: So far as our purpose is concerned, suffice it to state that the expression 'antecedent debt'[1] is well known in Equity and the Law of Trust. Where a trustee, in breach of trust, transfers trust property to a third person who pays value for it without notice of the breach of trust, the transferee, known as a bona fide purchaser, acquires beneficial ownership and is under no liability to the beneficiary.[2] The definition of value for this purpose is very strict. In general, to be protected, the purchaser must pay money or money's worth. A promise to pay, the discharge of an antecedent debt, or acceptance of the transfer as security for an antecedent debt is not sufficient 'value' to entitle the purchaser to protection as a bona fide purchaser.

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1. For example, the term is used thus: "In view of Courts of equity, ..., and cases of such as sale or pledge for an antecedent debt of the executor." Vide, J.Story, op.cit., vol.I, p.579.

2. "If a bona fide purchaser has no notice, either expressly or constructively, he merits the full protection of the court and his title cannot be impeached, even in equity, so long as notice is brought home to him only after he acquires the legal property." Vide, T.Lewin, On Trusts, 16th edn., (1964), p.655; also see, A.Underhill, Law of Trust and Trustees, 12th edn., (1970), p.681; J.Story, op.cit., vol.I, p.578. It may be noted here that an almost identical provision is made in the Indian Law of Trust, for saving of rights of certain transferees. Thus, "Nothing in section 63 entitles the beneficiary to any right in respect of property in the hands of - (a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed". Vide, T.V.Sanjiva Raw, The Indian Trusts Act, (Act II of) 1882, (Madras, 1910), p.289, section 64.

Thus, in Hardingham v.Nicholls,[1] wherein a bill was brought to be let into possession of an estate, the defendant pleaded a purchase for a valuable consideration, and that the money was paid, or was bona fide secured to be paid. The fact was, that the consideration-money was never paid, but only secured to be paid. It has been held there by the Lord Chancellor, that "the defendant has not paid the money yet, and therefore, as he has notice[2] now of the plaintiff's title, the money he has only secured to be paid, may never be paid, and consequently the plea must be over-ruled."[3] There is no need for us to go into further details here except to note that in order to grasp the above rule, it must be seen against the general background of the right of a trustee to bind the trust for the payment of antecedent debts of the trust; i.e., it is not presumed that he transfers in breach of trust if this is his intention. This is sufficient to prove that the term 'antecedent debt' already existed in Equity and the Law of Trust long before it was brought into, or 'discovered', in Hindu Law.

During the early period of the British administration of justice in India, when the British judges faced difficulties since, on the one hand, they lacked knowledge of Hindu law and, on the other hand, the Pandit's assistance in the matter gave rise to suspicion and therefore became unreliable, obviously they sought enlightenment through the principles of justice, equity and good conscience. In the context of the Hindu father's alienations of joint family property for the payment of his just debts, and his son's liability for the same

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1. (1745) 3 ATK. 3o4 = 26 Eng.Rep., 977.

2. Even as regards notice, it has been held, that "denying notice of plaintiff's title at the time of the execution of the deed, or the payment of the consideration-money, is not sufficient; you must swear you had no notice at or before the execution." Fitzgerald v.Burk, (1742) 2 ATK 397. Also see, Story v.Lord Windsor, (1743) 2 ATK.63o, 631. = 26 Eng.Rep., 776, pp.776-777.

3. (1745) 3 ATK. 3o4; = 26 Eng. Rep. 977.

under the doctrine of the pious obligation subject to the rule of 'tainted debts'; and of the need of protecting, in appropriate cases, certain alienee's rights, the main questions seemed to them similar to those arising in cases involving alienations by trustees having beneficial interest in the trust-property, for the payment of just antecedent debts of the trust. This seems to have led to the introduction of the concept of 'bona fide purchaser for value' in Hindu law.[1] With it came, or so it appears, the term 'antecedent debt' almost unconsciously, just to describe the father's pre-existing debts, (see below pp.204-206). So long as the Hindu law rule, that the son's liability could be enforced only after his father's death - real or civil - was observed, there was no serious problem, but as soon as the rule was extended so as to apply during the father's life time, this plain term turned into 'the doctrine of antecedent debts'. Now, instead of helping the bona fide alienee, it was required to go to the son's rescue for saving his birth-right from the clutches of his father's suddenly increased power of alienation of the joint family property. Let us turn to its new role in Hindu law.

(ii) The meaning: In English law, the term 'antecedent debt' probably meant no more than a just and already existing debt other than the cause, the consideration for the transfer immediately under discussion; whereas in English Equity payment of an antecedent debt as contrasted with the instant contract will not support the claim of a bona fide purchaser for value without notice against the beneficiaries, in Hindu law by contrast the beneficiaries (the sons) are bound if the purchaser (the alienee) provides money to pay the father's antecedent debt irrespective of the instant contract. This

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1. Reference may be made to Musst. Junnuk Kishoree v.Baboo Raghoonundun Sing, (1861) S.D.A.Rep.213; Girdhari Lall v.Kanto Lall, (1874) L.R. 1 Ind. Ap.321; Suraj Bansi Koer v. Sheo Proshad Singh, (1879) L.R.6 Ind.Ap.88; following Hanooman Pershaud's case (1856) 6 M.I.A.393, which was a case of a de facto manager (mother as guardian of her minor son). Also see, J.D.M.Derrett, C.M.H.L., op.cit., p.427.

is because, unlike an English trustee, a Hindu father's debts cannot bind the beneficiaries so as by themselves to constitute a charge. At Hindu law its meaning as well as its application caused, eventually, a great controversy.[1]

In a case[2] decided in 1861, the term 'antecedent economy' has been used probably to indicate prior liabilities (debts etc.) or otherwise of the debtor - the father alienor. Later on, after citing this case with approval, their Lordships of the Privy Council referred to a previous decision[3] of the Board, and while in the course of comparative juxtaposition of these two decisions in the context of the son's liability to pay his father's debts, observed that the latter decision has gone beyond that of the first,

> "because it treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Courts;" [4]

but immediately following that, in the first proposition that they deduced from these two decisions, they seem to replace the term 'pre-existing debts' by 'an antecedent debt'.[5] In this sense, therefore, the term 'antecedent debt' would mean a debt existing prior to the transaction in question. Literally, this may seem to be the correct meaning of the term, but when

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1. In this regard reference may be made to: 'The Doctrine of Antecedent debt', an anonymous article, at A.I.R. 1923 Journal and P.C., pp.71-8o and 82-88; K.S.Mathur, at A.I.R. 1937 J.& P.C., 49-53; R.K.Ranade, (1953) 55 Bom. L.R., J., 94-1o2; and (1961) 63 Bom. L.R., J., 81-84; J.D.M.Derrett, (1955) 18 S.C.J., 139-15o; also see his I.M.H.L., cit.above, pp.275-277; 'Indica Pietas', cit.above, pp.52-56; C.M.H.L., cit.above, pp.97-1o1; P.V.Kane, H.Dh., cit.above, vol.III, p.45o.
2. (1861) S.D.A. Rep.213, 221; It is argued there, "that as purchasers, they could not be required to be prepared with proofs of the antecedent economy or good conduct of the owner of the estate". (p.221); also see Hanooman Pershaud's case,op.cit.,p.418
3. Girdhari Lall's case, op.cit.; (1874) L.R. 1 Ind.Ap.321.
4. Suraj Bansi Koer's case, op.cit., (1879) L.R.6 Ind.Ap.88, pp.1o5-1o6.
5. Ibid., p.1o6.

it came to be construed in relation to other legal concepts, and in different circumstances, its meaning seems to have been variously understood (see below pp. 206-207). However, the controversy was settled, so far as the meaning is concerned, by the Privy Council in the case of Brij Narain v.Mangala Prasad.[1] According to the definition there, "Antecedent Debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached."[2] To this, in itself, there appeared no objection.

(iii) The scope: When its scope came under scrutiny, however, different High Courts in India, and even the Privy Council, seem to have differed. For the understanding of this difference of opinion, one must see[3] the term 'antecedent debts' in the context of the powers of a Hindu father to bind his male issue under the doctrine of the Pious Obligation, especially in its extended boundaries in view of the principle of 'bona fide' alienee's equitable rights. Thus, seen in this context, the above definition may mean an indebtedness of the father prior in time to, and independent in origin of, the particular transaction of joint family property, whether by way of sale, mortgage or other disposition which is sought to be enforced against the male issue.[4] In this context, therefore, "according to Madras and Allahabad rulings, it referred to a debt which existed prior to the date of sale or mortgage, and not to a debt incurred at the time of the sale or mortgage;" ... and "according to Bombay and Calcutta decisions, a debt, though not existing prior to the date of

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1. (1923) 26 Bom. L.R.5oo (P.C.).
2. Ibid., p.5o8, (proposition iv, per Lord Dunedin). The words are slightly differently reported in different reports: see (1923) 51 I.A.129; 46 All.95; A.I.R.1924 P.C.5o.
3. As regards the position at the English law, see p.199 above where we have referred to trustee's powers.
4. R.K.Ranade, op.cit., at p.95, has given almost identical definition.

sale or mortgage, was recognised as an antecedent debt, if it was put into litigation in a subsequent suit."[1] The latter view is apparently in conflict with the strict construction of the above definition of the Privy Council. But even the Privy Council seemed uncertain as to the proper function of this doctrine.[2] In fact, the abrogation of the śāstric Hindu law injunction regarding the application of the son's pious obligation (i.e., only after the father's death as referred to above), itself produced this dilemma. Thus, in a suit[3] of 1861, brought on behalf of a minor son during his father's life-time, to recover joint family property from the father's various alienees, it was held that the Court would not interfere with the sales, which had "taken place by the intervention of the Courts for debts, which, though caused by extravagance, were such as a son would be liable for."[4] Thus, the intervention of the court in conjunction with the son's inability to prove "the invalid nature of the debts"[5] seems to have been the first cause of by-passing the old Hindu Law rule (while this happened, incidently, the śāstric rule was not invoked here). Afterwards in 1874, it was emphasized by the Privy Council, in Girdhari Lall v.Kantoo Lall,[6] "that the fact that the father alienor is alive is irrelevant."[7] Thus, the śāstric rule was brushed aside for

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1. Ibid.
2. In Sahu Ramachandra v.Bhup Singh (1917) I.L.R.39 All.437 (P.C.); The Privy Council speaks of this doctrine as having arisen from the necessity of protecting the rights of third persons, but in Brij Narain's case (op.cit.), the doctrine has been described by their Lordships of the P.C. as a part of the doctrine of Pious Obligation.
3. Musst. Junnuk Kishoree's case, op.cit., (1861) S.D.A.Rep.213.
4. Ibid., p.222.
5. Ibid.. It may be noted here that in the case of Hanooman-Persaud Panday v.Musst.Babooee, (1856) 6 M.I.A.393, the liability of the ancestral estate was held to depend on the nature of the debt. But in that case the father was dead.
6. (1874) L.R.1 I.A.321.
7. Ibid., pp.33o-331; also see, J.D.M.Derrett, at (1955) 18 S.C.J., op.cit., p.141.

the purpose of protecting the bona fide alienee's equitable interest.[1] What was not realized, it seems at the time, was the direct effect of the logical extention of this protection on the birthright of the Hindu son.

It could be argued that the presence of the śāstric rule might have affected the father and his creditors as alienees, both psychologically as well as in practice, as a deterrent, (a) because the father would have known, then, that it would be he himself, in the first place, who would have to pay his personal debts and, therefore, he would have been more cautious in his borrowings; and (b) the would-be money-lender or an alienee of the father, too, would have thought twice before parting with his money, as he would have known that he could not have easy access to the joint family property, in case the loan was meant for the father's personal purposes, until the death, real or civil, of his debtor. He could have lawful access to the joint family property, provided the money lent was for a just purpose of the joint family. Otherwise, however, the suggested legal position would have made him behave carefully in all his dealings with any Hindu father.

It could be argued that this would have hampered the father's creditworthiness in the money-market. But what would his credit facility be for? It would appear that the argument is misleading, for it ignores the fact that he was free to alienate the whole joint family property, if he did so only in the interest of a recognisable family need or benefit. However, creditors could be Muslims or Christians, and the internal logic of the Hindu family law did not bind them - and in a poly-communal country the attraction towards legal liberty was overwhelming. The question of the credit-facility is of relative importance even today, depending upon the facts of each case.

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1. Girdhari Lall's case, cited above, (1874) L.R. 1 I.A.321, at p.332.

Then again, one might sympathise with a bona fide creditor or alienee, assuming that he was tricked into the transaction by a clever father. Hindu law does not admit, directly or by implication, any kind of cheating by the father, and therefore, one would imagine, that it would not condone such dealings. In this sense, if the Court had attempted to protect, in appropriate cases, such innocent alienees, even in the absence of any express Hindu law rule to that effect, one would have hardly disagreed with it. After all, Hindu law does, like English law, admit of exceptions.

The fact is, however, that the process, which began for the benefit or protection of bona fide alienees, has unmistakably resulted into making it possible to enforce his father's debts against the son from the moment he incurred the liability; thus exposing the whole joint family property for disposal by the father almost at will. Out of this situation arose the above-mentioned difference of opinion. In some quarters, it was hoped, evidently, to put some brake on the father's power of alienation and to salvage something of the son's birthright. It is to this end that the doctrine of antecedent debt is supposed to work.[1]

(B) Its place in modern Hindu law: Its place depends obviously upon its utility in view of the function it has been assigned to perform. In the present situation, technicality rather than substance seems to have assumed the greater importance. True, there cannot be legal liability of the son unless an untainted debt of the father is already in existence. In view of this, it has been rightly said in respect of mortgages that "strictly and accurately no mortgage can be enforced against the family unless it was granted by the manager either for legal necessity or for the benefit of the

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1. J.D.M.Derrett, 'Indica Pietas', cit.above, p.54.

family or, alternatively, for the payment of an antecedent debt binding on the coparceners under the pious obligation."[1] Thus, when the doctrine of antecedent debt was applied to determine the son's liability particularly in respect of mortgages, it is well-known[2] that serious problems arose.

Thus one is at a loss to understand the anomalous situation created by this doctrine, in which a creditor with the security of a mortgage[3] has been placed in a position worse than that of a creditor who has advanced a loan only on the father's personal covenant; for, as against the latter, the former is obliged to institute a suit, first, to establish the father's liability, and then to enforce it. Obviously, this has startled many.[4] One wonders whether there is any other legal system in which a secured creditor is comparatively worse off than an unsecured one. Now, in order to mitigate this situation, the Supreme Court[5] seems to have suggested a compromise, the success of which depends entirely on the son's failure (or unwillingness) to challenge the mortgage; for, if he so fails, in view of the Court, then he cannot prevent the sale, once the mortgage decree has been passed. If the sons become so charitable, presumably, as the Supreme Court expects them to be, then of what use is this doctrine? With respect, it must be pointed out here that the suggestion seems more of a pious nature than a practical one. Besides, there have been other suggestions to the effect that the

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1. J.D.M.Derrett, C.M.H.L, op.cit., p.98; also see n.2 there for the authorities on the point.
2. Reference may be made to J.D.M.Derrett, 'Indica Pietas', op.cit., p.54; R.K.Ranade, at (1953) 55 Bom. L.R.,J., 94, 99-1oo; K.S.Mathur, op.cit., pp.5o-51; J.D.M.Derrett, at (1955) 18 S.C.J., op.cit., pp.142-143; also see his C.M.H.L., op.cit., pp.98-99; I.M.H.L., op.cit., pp.276-277.
3. "The debt secured by a mortgage was not antecedent to that same mortgage, and therefore, that mortgage itself conferred no rights over the interests of the sons." Vide J.D.M.Derrett, 'Indica Pietas', op.cit., p.54; also see the authorities cited there in f.n.43 & 44.
4. R.K.Ranade, op.cit., p.99.
5. In the case of Faqir Chand v.Sardarni Harnam Kaur, A.I.R. 1967 S.C. 727 at p. 731.

doctrine of 'antecedency' should be abolished, either completely[1] or partially, so far as it applies to mortgages.[2] Now, the suggestion that 'antecedency' should be completely abolished, while the doctrine of Pious Obligation is applicable during the father's life-time, is to say, by implication, that the sons' birthright need not be protected, for any alienation of the father could carry away their interest. Thus, this suggestion would make sense only if we decided to disregard the son's birthright or, alternatively, if we brought back the old śāstric rule that the son's pious duty commenced only after his father's death: real or civil. The second suggestion, on the other hand, appears to aim at avoiding unnecessary litigation, and to that extent is useful. However, the example cited there[3] does not necessarily represent the usual situation. Whether the father takes money first or after giving security will remain a question of fact. Generally, the intensity of the father's want or need vis-a-vis the lender's advantage would determine who imposes his will on the other party; and, in most cases, it is the money-lender. Unless the security is given first he would not normally lend money. So, the presumption could not always be in favour of the alienee. If that be the case, then, to eliminate the facility of postponing the alienee's claim is likely to do more harm to the son's interest.

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1. I.Bhaumik, at Law Quarterly (Calcutta), vol.6, No.2 (1969), p. 128 ff.

2. J.D.M.Derrett, C.M.H.L., op.cit., p.1oo, n.1o

3. "When sons challenge an alienation ... he owed no money to anyone! But in this case the father first becomes indebted (when he takes the money) and then alienates ... ". Vide, ibid., p.1o1.

In conclusion, however, it may be said that this discussion proves how Hindu law is affected by doctrines such as 'antecedent debts'. The same appears to be true in respect of the concepts of 'benefit to the debtor's soul' and 'immoral or illegal debts' (see the following chapter). In fact, "the common law of England, with its statutory modifications and the doctrines of the British courts of equity, has deeply coloured and influenced the laws and the system of judicial administration" of India.[1]

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1. M.C.Setalvad, The Common Law in India, (Bombay, 1970), p.1.

CHAPTER VI

THE CONCEPT OF AVYĀVAHĀRIKA DEBTS AS DEVELOPED THROUGH JUDGE-MADE LAW

VI.1 General

VI.2 The meaning of the term avyāvahārika

VI.3 The extent of the concept of avyāvahārika debts

VI.3.1 Cases involving debts arising out of borrowing or imprudent transactions of the father

- (i) Debts due to the father's extravagant indulgences
- (ii) Commercial debts
- (iii) Debts due to fines
- (iv) Debts on account of costs

VI.3.2 Debts arising out of certain objectionable conduct or acts of the father

- (i) Cases involving acts of the father simply to hurt others
- (ii) Cases involving the father's acts leading to some benefit to him or the the joint family at the cost of others
  - (a) Cases involving mesne profits
  - (b) Cases involving misappropriation of other's property
    - (i) Criminal misappropriation or theft cases
    - (ii) Cases of misappropriation where the father's liability has been treated as a breach of trust or civil duty

VI.3.3 Cases on time-barred debts.

VI.4 Modern uncertainties concerning the concept of avyāvahārika debts

VI.1 GENERAL

We have already discussed (see above chapter IV, pp.153-175) the śāstric position of the concept of avyāvahārika debt, as understood by commentators and modern scholars. Now we shall enquire into its treatment by the courts.

It may not be out of place, however, to note that after a certain knowledge of some śāstric texts, commentaries and digests on the Hindu law, and through their experience of the Paṇḍits' opinions[1], the British judges in India (as well as the scholars of the time) seemed to conclude that the law lacked[2] certainty (see above pp.179-180).

To ascertain the principles of Hindu law, therefore, F.W.Macnaghten said,

> "We ought in our decisions, to be guided by those rules, which are most consistent with its general tenor, which have been preferred to others, by the most of their commentators, and which appear to be most rational in themselves. We shall then by a series of adjudications give consistency to the law, and leave the rights of a people unmolested."[3]

According to him, "nothing but an ascertainment of the law, can prove a corrective of this evil."[4] This ideal, it would

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1. The Privy Council, in 1861, said "where an opinion, apparently discordant from works of current and established authority, is delivered by Pandits, it must not be taken on their authority to be a correct exposition of the law. They should be questioned further as to authorities, usage and generally received opinions." - The Collector of Masulipatam v. Cavaly Vencatta Narainpah, (1865) 2 Suth. W.R. 61, (P.C.).
2. "I apprehend that the Hindu Law, in its pure and original state, does not furnish many instances of uncertainty or confusion. The speculation of commentators have done much to unsettle it, and the venality of the Pandits has done more." - W.H. Macnaghten, Principles and Precedents of Hindu Law, vol.1, cit.above, preliminary remarks, p.IV
3. Considerations on Hindoo Law, cit.above, preface, pp.XI-XII.
4. Ibid.

appear, remained the directive principle throughout the British Period.[1] Bearing this desire of the courts in mind, let us investigate how the judges construed and applied the concept of avyāvahārika debt. We may, then, be able to explain its modern significance and predict its likely future.

VI.2 THE MEANING OF THE TERM AVYĀVAHĀRIKA

H.T.Colebrooke[2] translated the term na vyāvahārikam as "for a cause repugnant to good morals" to which we have already referred above (see p.160) along with its other renderings. But we may note the early date of his translation, i.e., c. 1796,[3] though it was published in 1801.

Now, it would appear that this rendering was sufficient for administering Hindu law on the subject, for the meaning of this term did not come up directly for judicial pronouncement until the case of Durbar v. Khachar.[4]

The courts had recognized[5] the son's liability to pay his father's debts, but, on the other hand, they were also aware of the rule that "should a father contract one for the purchase of spirituous liquors, or debauchery, or other improper objects, it is not obligatory on the son"[6]. (My emphasis).

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1. "Our principle is simply this - uniformity when you can have it, diversity when you must have it, but in all cases, certainty." T.B.Macaulay's view, q.by W.Stokes, The Anglo-Indian Codes, cit.above, at p.X of the general introduction.
2. He was himself a judge of Mirzapore, resident at the court of Berar, (see the front page of his Digest, cit.above), and subsequently for long a judge of the Sadar Dewani Adalat, and a great scholar.
3. Ibid., preface, p.XXV.
4. (1908) I.L.R. 32 Bom. 348.
5. A.H.Mahomed v.J.Seat Cossaul Chund, (1779) Mort.Montr.272.
6. Timmarah v.Veneapah, (1807), vide T.Strange, Hindu Law, II, 3rd edn., (Madras, 1859), p.456. Here, the son of an insolvant debtor was held liable to pay the decretal debt which was not one excepted by the Hindu Law.
   It may be noted here that it appears from the case of Nhanee v. Hureeram Dhooluba, (1814) 1 Bor. 95, that the Courts were aware of all the other excepted debts which the śāstrakāras have enumerated elsewhere. See, note there at p.101 wherein "the balance of debts, etc." is mentioned.
   The full quote runs as follows, "The balance of a debt contracted for Liquor, Sexual intercourse, or Gambling; a Fine; the amount of a toll, (Shoolk); and a gift; and 'Vrithu Dan' that is money promised to Swindlers, such debt of his Father, a son shall not pay." - Keshow Rao Diwakur v. N.J. Patunkur, (1822) 2 Bor. 194, 200.

Subject to the Paṇḍit's intention, the term 'other improper objects' might be taken here to point to either the remaining listed debts or avyāvahārika debts. But, assuming that he intended to state both the listed debts by naming only two of them illustratively, as well as the residuary category, then the term 'improper objects' might represent the term avyāvahārika, meaning thereby the debts incurred for improper purposes. It is not clear, however, what should be understood by 'improper purposes'. Once again, if the choice of the debts for spirituous liquors and debauchery is viewed as indicative of the nature of the rest of the debts, then improper purposes might have some reference to despised and / or immoral debts.

Later, in the case of Musst. Junnuk Kishoree Koonwur v. Baboo Rughoonundun,[1] the Court was prepared, it seems, to hold, if proved by the strongest and most reliable evidence as to the particular nature of the dissipation[2] of the debtor (father), that the son was not liable for his father's debts, incurred for the satisfaction of his dissipations, as being repugnant to good morals. But, as there was no mention of any particular nature of dissipation, which might have explained the phrase 'being repugnant to good morals', the case hardly throws any further light on the meaning of the term avyāvahārika.

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1. (1861) S.D.A.R.(L.B)213.

2. The Court observed, "all dissipation tends to extravagance, but all extravagances are not caused by dissipation repugnant to good morals in the Hindoo sense of the term." Ibid, p.220. This was a case of various debts and consequent sales of ancestral property by the father for his extravagant living, though no connection between his debts and immorality was proved. The property sold was of a value far beyond the amounts of decrees, and many alienations were made for very small considerations as against actual value of the properties There was not any legal necessity. Most of the alienees knew or were in position to know actual family circumstances as well as the father - alienor's habits.

This decision makes it clear, however, that mere extravagance as such does not amount to a purpose repugnant to good morals,[1] though the debts contracted "as an act of reckless extravagance or of wanton waste"[2] might be construed as an unjust debt,[3] and hence avyāvahārika. The Privy Council has repeatedly[4] cited, with approval, the above decision of the Sudder Diwanee Adaulat, and perhaps, as a result of this convincing decision it seems to have accepted the interpretation as given therein[5] of the phrase 'repugnant to good morals'. Having regard to that decision, however, the Privy Council observed that,

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1. Ibid., p.220, also see Beer Persad v.Doorga Persad, (1864), extra vol., Suth, W.R. 310.
2. Devi Ditta v. Saudagar Singh, (1900) 35 Punj. Records, No.65, p.291, at p.296 (F.B.).
3. Ibid., "the words 'just debt' mean a debt which is actually due, and which is not immoral, illegal, or opposed to public policy. It also means a debt not contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interests of reversioners." (My emphasis). C.f Sardari Mal v.Khan Bahadar Khan, (1899) 34 Punj. Record No. 11, p.56; at p.65 a definition of a just debt is given. It is said to be
   > "one which (1) is really due and (2) has been contracted for a purpose other than immoral or forbidden by law or opposed to public policy, and (3) can be recovered from his person or property generally".

   And further at p.66 - If a creditor has knowingly advanced money "for acts of wilful and wanton waste and reckless extravagance, ... the debt due to him cannot be called a just debt."
4. See Girdharee Lall v. Kantoo Lall, (1874) 1 I.A. 321, 332; Suraj Bunsi Koer v. Sheo Proshad Singh, (1879) 6 I.A. 88, pp. 104-105.
5. Musst. Junnuk Kishoree's case, cit.above, at p.220; also at p.222, it is stated that to succeed the son must prove that the debts were "immoral, and such as under Hindoo law, the son would not be liable for."

> "it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose."[1] (My emphasis).

Thus, the well-known phrase 'illegal or immoral' in the Hindu law of debts, might have come into being as a result of this construction. And, since then, though the expression was doubtless originally meant to render avyāvahārika, it has come to be used as a compendious term to cover all the cases in the smṛtis.[2]

Although a definition of avyāvahārika was not agreed upon, this lack of definition, characteristically, did not prevent Courts from deciding whether or not a particular debt was tainted and so irrecoverable or not. In view of their limited understanding, the debts of the father incurred, for example, by way of grossly[3] extravagant expenses, fraud,[4] mis-appropriat-

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1. Girdharee Lall v. Kantoo Lall, cit.above, (p.213,f.n.4) at p.332. Obviously, the term 'illegal' represents such debts as 'under Hindoo Law, the son would not be liable for', referred to in the above f.n.5. Now, as there is no mention of any enumerated debts, in the Sudder Diwanee Adulat's case, this phrase could not be construed as representing those debts. If this is so, then it may be taken to mean various debts which would come under avyāvahārika category, save immoral debts. In this sense, Knight, J.'s observation that "it is this word (i.e., avyāvahārika) that has crept into our text books under the guise, or disguise, of 'illegal or immoral' (my emphasis,) might be correct. (See Durbar v.Khachar, cit.above, (p.211,f.n.4), at p.351). On the other hand, the term 'illegal' is apparently capable of meaning all the excepted debts, in a sense, including listed debts, for according to Hindu Law, they are illegal debts.
2. J.D.Mayne, Treatise on Hindu Law and Usage, 11th edn., (Mad., 1950), p.399.
3. Sita Ram v.Zalim Singh, (1886) I.L.R. 8 All. 231, the son was held liable because the evidence did not establish that the father has wasted the money for immoral purposes.
4. Shah Wajed Hossein v. Baboo Nanku Singh, (1876) 25 Suth.W.R. 311, the debt incurred for meeting liability arising out of the father's fraud (leasing his principal's property without authority) was held to be binding on the son.

ion[1] of other's property, decrees[2] of the Courts for damages, mesne profits,[3] interest and costs,[4] or even imprudent transactions,[5], and time-barred[6] debts, were variously construed,

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1. Mahabir Prasad v. Basdeo Singh, (1884) I.L.R. 6 All. 234; Pareman Dass v. Bhattu Mahton, (1897) I.L.R. 24 All. 672; Mc-Dowell v. Ragava Chetty, (1904) I.L.R. 27 Mad. 71: - criminal misappropriation, hence sons were held not liable.
   But, in Natasayyan v. Ponnusami, (1893) I.L.R. 16 Mad.99; Kanemar v. Krishna Chariya, (1908) I.L.R. 31 Mad.161; and Erasala v. A.R. Chetty, (1908) I.L.R. 31 Mad. 472; - sons were held liable, for the debts were considered to be mere breach of a civil duty.
2. Jai Kumar v. Gauri Nath, (1906) I.L.R. 28 All. 718; - a promissory note given by the father to satisfy bona fide decree. It was contended that the promissory note was given for strifling prosecution. It was not proved. The son was held liable.
   But in Kartar Singh v. Harjhimal, (1879) Punj. Records No. 128, p.282, the father had stolen and converted to his own use certain property belonging to a third person, who sued and obtained a decree against him for the value of the property.
   The son objected to its execution, but the Court ruled that it was impossible to hold that a debt created by a decree is a debt contracted for an illegal or immoral purpose, merely because the act from which the obligation to compensation arose was an illegal or immoral act. The son was held to be liable for the debts.
   In view of the later decision (see f.n.2-5 atp.217 below) this decision seems to have gone too far, though it seems to be in keeping with the views of the orthodox Hindu Court of c. 1677; see below p.227 f.n. 1.
3. Peary Lal v. Chandi Charan, (1906) 11 C.W.N.163; the father had wrongfully possessed land, hence the decree for possession and mesne profits against him. The son was held liable.
4. In Musst. Nanomi Babuasin v. Modun Mohun, (1885), 13 I.A.1, the liability arose out of a loan; but mesne profits, interest and costs also were involved. The Judicial committee observed (at p.19) that "whichever it was, they think the High Court are clearly right in holding that it must be taken as a joint family debt." Son was held liable.
5. In Khalilul Rahman v.Gobind Pershad, (1893) I.L.R. 20 Cal. 328, the father incurred debts which were neither for necessity nor illegal or immoral, though they were of imprudent or unreasonable character, and it was held that a pious duty of the son attaches to them under the mitākṣarā law.
   Also see "mere imprudence on the part of the borrower does not bring the debts in the category of avyāvahārika debts." - Rajeshwar v. Mangniram, A.I.R. 1933 Nag. 89, at p.92.
6. Narayansami v. Samidas, (1883) I.L.R. 6 Mad 293; Here, though the debt of the father, secured by promissory note, had been declared barred by limitation, it was held that the son was bound to pay it.

without going into the exact meaning of the term avyāvahārika.

This brings us to the first judicial rendering of the term avyāvahārika. Thus, Knight, J. has translated it as "unusual, or not sanctioned by law or custom."[1] In the view of Mookerjee, J. "the term vyāvahārika may be accurately rendered as equivalent to lawful, usual or customary."[2] Sadashiva Ayyar, J. has said,

> "If I might venture upon giving my own translation of the expression avyāvahārika, I would paraphrase an avyāvahārika debt as a debt which is not supportable as valid by legal arguments and on which no right could be established in the creditors' favour in a court of justice."[3]

According to Venkatasubba Rao, J. the right meaning of the word may be said to be "grossly immoral or flagrantly unjust",[4] while in the view of the Allahabad High Court, an element of

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1. Durbar v. Khachar, cit.above, (p.211,n.4) at p.351. This definition did, however, not find approval in later cases of the same high court: Ramakrishna v.Narayan, (1915) I.L.R. 40 Bom. 126, (debts due to trade, carried in contravention of Government Servants' conduct rules, 1904). Hanamant Kashinath v. Ganesh Annaji, (1918) I.L.R. 43 Bom. 612, (breach of civil duty); Bal Rajaram v. Maneklal, (1931) I.L.R. 56 Bom. 36, (a case of debts due to recklessly or imprudently managed trade); sons were held liable.

2. Chhakauri Mahton v. Ganga Prasad, (1911) I.L.R. 39 Cal. 862, 868.

3. Venugopal Naidu v. Ramanadhan Chetty, A.I.R. 1914 Mad. 654, 655; = (1912) I.L.R. 37 Mad. 458, 460; also see Mohammad Ali v. Jhao Lal, A.I.R. 1928 Oudh. 10; cf. Sardari Mal v. Khan Bahadur Khan, cit.above, (p.213, f.n.3).

   In the view of the Nagpur High Court, "the word avyāvahārika does not merely comprise debts which are illegal or immoral only, but all debts which the court regards as inequitable or unjust in point of Hindu Law to make the son liable." Rajeshwar v. Mangniram, A.I.R. 1933 Nag. 89, 91.

   But Nagpur High Court agreed, in this case (see p.91, C. 1-2) with this definition of Sadashiva Ayyar, J.

4. Ramsubramania v. Sivakami, A.I.R. 1925 Mad. 841, at p.843. For the facts see below p. 222.

criminality[1] may make a debt avyāvahārika,[2] being repugnant to good morals.[3] But Beaument, C.J. has defined it as "illegal, dishonest or immoral."[4] Lastly, in Hemraj v. Khem Chad,[5] Sir Madhavan Nair, delivering the judgement of the Judicial Committee, says,

> "having regard to the principles underlying the rule of 'pious obligation', which forms the foundation for the son's liability,[6] their Lordships think that the translation of the term avyāvahārika as given by Colebrooke makes the nearest approach to the true conception of the term as used in the smrti text, and may well be taken to represent its correct meaning. In their Lordships' view, the term does not admit of a more precise definition".[7]

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1. Jagannath v. Jugal Kishore, (1926) I.L.R. 48 All. 9. For further details, see below p.228.
2. Widya Wanti v. Jai Dayal, A.I.R. 1932 Lah. 541; Bai Mani v. Usafali, (1931) 33 Bom. L.R. 130; Toshanpal v. Dist. Judge of Agra, (1934) I.L.R. 56 All. 548 (P.C.); Suraji v. Ratanlal, (1943) 47 C.W.N.266.
3. Brij Behari Lal v. Phunni Lal, A.I.R. 1938 All. 377; Garuda Sanyasayya v. Nerella Murthenna, (1918) 35 M.L.J. 661, 633.
4. Govindprasad v. Raghunathprasad, I.L.R. 1939 Bom.533 (F.B.): at p. 543 or see (1938) 41 Bom. L.R. 589 (F.B.).
5. (1943) L.R. 70 I.A. 171.
6. "The pious obligation of the son to pay his father's debts ... is confined to debts contracted for moral purposes." Jettyapa v. Laximaya, Bom. H.C. unreported printed judgements, vol. V, (1881-83), 579, at p.581. The present position is "if the debts are not vyāvahārika or are avyāvahārika the doctrine of Pious Obligation cannot be invoked". Luhar v. Doshi, A.I.R. 1960 S.C. 964, 966; also see Jakati v. Borkar, A.I.R. 1959 S.C. 282, 287. Also see above, Chapter I, pp.46-51.
7. Hemraj v. Khem Chand, cit.above (see f.n. 5) at p.178. The Supreme Court's observations appear to affirm this position: Luhar v. Doshi, cit.above, (see f.n.6) , at p.966, para 8; Jakati v. Borkar, cit.above, (see f.n.6) at p.286, para 9; also ee, Loganathan v. Ponnuswami, A.I.R. 1969 Mad.15; State v.Mohan Lal, A.I.R. 1971 Raj.318 p.320. Also, J.D.M.Derrett, I.M.H.L., cit.above, p.314; N.R. Raghavachariar, Hindu Law, 6th edn., cit.above, p.346; J.D.Mayne, Treatise on Hindu Law and usage, 11th edn., cit. above, p.399; F.D.Mulla, Principles of Hindu Law, 13th edn., cit.above, p.351, also L.J.Manjrekar, 'Avyāvahārika debts' at(1947) 19 Bom.L.R.,J., 3 at p.5.

Thus, this mere statement of what the Courts have meant by the term avyāvahārika debt brings us back to our starting point, and this appears to be the present position.

Obviously one wonders why the Courts differed from Colebrooke's definition in the first place. In view of the fact that they did differ, it would be unrealistic[1] to suppose that now they are satisfied with his rendering. However, if we examine the causes that led to various definitions and interpretations of this term avyāvahārika, we may be able to grasp its proper meaning as well as its scope.

It may be noted in the first place that we are not concerned here only with the laymen's understanding of the word avyāvahārika, but we are interested in its import from the standpoint of excepted debts in connection with religious and moral liability of a Hindu son. The definition that may be arrived at by the Courts is expected, therefore, to take into account on the one hand, the religious and moral nature of the liability, and on the other hand the intention of the śāstras, in excluding these debts from the son's pious obligation to pay them.

In this context, it seems quite clear from the cases, referred to above (pp. 211-17) that those debts which are tainted with moral turpitude would generally be regarded as avyāvahārika. According to the śāstras the merits and demerits may be shared among the father and his sons. But as far as the repayment of excepted debts is concerned, it is clearly stated that it is not the son's responsibility, (see above pp.60-64). By implication therefore, in view of the śāstras, any payment by the son of such debts might not confer any spiritual benefit, which is the main purpose of the son's liability. Considering this as the correct position, any construction of the term avyāvahārika debt, which would not conform to this view, might lack the sanction of Hindu law. Let us examine the cases

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1. For in spite of this approval, the A.P.High Court has produced yet another rendering of the term; see below, p. 254 , f.n. 1

on this subject.

In Durbar v. Khachar[1] the plaintiff had obtained a decree against the defendant's father for damages to the plaintiff's property, caused by a dam created by the latter which obstructed the passage of water thereto. On the latter's death the decree was sought to be enforced against his son with respect to the ancestral estate in the hands of the son. According to the lower Appeal Court the act of the father was 'illegal, wrongful and malicious', and conferred no benefit upon the ancestral estate. The High Court accepted the findings, but treated the act as no more or less than a civil wrong. In view of the facts of the case and in the context of the texts cited,[2] the definition of avyāvahārika given by Knight, J.[3] appears to comprise[4] the enumerated debts, besides all improper ones. This is evident when he says,

> "put into simple English, the texts amount to this: that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices."[5]

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1. Durbar v. Khachar, cit.above, (p.211,f.n.4) at p.350.
2. Bṛhaspati, XI.51; Uśanas quoted in the Mitākṣarā on Yājñ. II.48, (according to others Yājñ. II.47, see above p.61). It may be noted here that the actual wording used in J.Bhattacharya's Hindu Law, 2nd edn., (Cal.1893) at p.247 differs from that which is quoted in this case. There Uśanas' sloka is translated as follows: "A fine or the balance of a fine, ..., are not to be paid by the son, neither shall he discharge debts improper (not sanctioned by law or custom). The words in the bracket are missing in Knight, J.'s quote, but his definition includes them. Thus, in fact, he has merely reproduced Mr. Bhattacharya's rendering .. - see Durbar's case, op.cit., p.351.
3. It may be noted here that the other judge on the Bench - Mr. Justice Chandavarkar was himself an eminent Hindu lawyer and scholar, who has agreed to this definition.
4. But according to Wassoodew, J., "the application of the rule of ejusdem generis would be out of place in view of the fact that the rule containing the exception in question purports to assimilate the views of the different Smṛti writers in a compendious form". - Govindprasad v.Raghunathprasad, cit. above, (p.217, f.n.4), at pp.547-48.
5. Durbar v. Khachar, op.cit., p.351.

It is in this sense, that avyāvahārika bears wider significance than its rendering merely as 'illegal' or 'immoral'. But in view of the facts of this case, what appears to have been missing from their Lordships' construction is the actual spirit of 'righteousness as applied in an orthodox Hindu Court' (vyavahāra); because it appears that the concept of 'benefit to the ancestral property' has unduly influenced[1] this construction. This definition is, therefore, abstract and misleading: abstract, because it does not precisely point to the immoral nature of the debt; and misleading, because it seems to introduce the test of benefit to estate, perhaps in a completely different sense from that which Balambhatta [2] seems to have in mind (see above p.162).

Moreover, the other test laid down in this case of 'a decent and respectable man' seems more idealistic than realistic, for it would be impossible to be sure that even a decent and respectable man would not be subject to some 'failing' or commit 'follies'! Thus, looked at from the construction placed upon it, the definition seems to comprise cases involving a slight lapse on the part of the father from strict rectitude.[3] In this sense, therefore, it appears to place "too restricted a construction upon the term avyāvahārika and excludes debts for which the son may be held legitimately liable."[4]

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1. Ibid., pp.351-352.

2. Bālambhaṭṭa seems to interpret na vyāvahārikam as na kuṭumbopayogītyarthaḥ perhaps in the sense that where the father had incurred debts which he spent, presumably, on śāstrically despised purposes instead of spending them for the benefit of the family. It is in such contexts that the debts spent, not in the family's interest, were, in his opinion, avyāvahārika.
   Cf. Deoba v. Babaia, A.I.R. 1927 Nag. 337. In this case the question was whether a Hindu son be held liable for torts committed by his father .... even if these torts resulted in no benefit to the joint estate. Held that such liability does not amount to a debt which he is bound to discharge, and is distinct from obligations legally incurred in consequence of a contract or quasi-contract. But he can be held liable for such torts only to the extent to which the family estate has been benefited (p.338).

3. R.K.Ranade, cit.above, p.39.
   "It is not every impropriety or every lapse from right conduct

f.n. continued next page

According to Mookerjee, J. vyāvahārika (the positive) means "lawful, usual or customary",[1] Which hardly differs from that of Knight, J., in the sense that avyāvahārika is equivalent to not 'lawful, usual or customary'. The facts of the cases were almost identical. But this did not prevent him from holding that,

> "the liability imposed by the Court upon the father to indemnify the person, with whose property he had improperly interfered created a debt which might justly be recovered from the ancestral property in the hands of the son."[2]

Thus, the difference lies not so much in the wording but in its interpretation; and therefore, according to Mookerjee, J., such debts of the father would not be avyāvahārika.[3]

In Venugopala Naidu v. Ramanadhan Chetty,[4] (1914) the father was accountable as trustee for certain sums and the sons were held liable, on the footing of general principles of morality, i.e., it is a sacred obligation to restore to those lawfully entitled the money unlawfully retained.[5]

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f.n. from last page) that stamps the debt as immoral;"
- per Venkatasubba Rao, J., in Ramasubramania v.Sivakami, cit.above, (p.216, f.n.4). On the other hand, the degree of purdence required of a Hindu father is expected to be higher in view of his not being the sole owner of the joint family property. Thus, while delivering the judgement of the Full Bench, Boys, J. says,
"in view of the fact that he was not the sole owner of the property but others had an interest in the property, the degree of prudence required of him would be greater, as in the case of a trustee, than if he were the sole owner."
See Jagat Narain v. Mathura Das, (1928) 25 A.L.J.841, (F.B.) at p.844.

4. Mookerjee, J. in Chhakauri Mahton v. Ganga Prasad, cit.above, (p.216, f.n.2), at p.874.

1. Ibid, at p.868.
2. Ibid., at p.874.
3. This view has been approved in Venugapala Naidu v.Ramanandhan Chetty, see f.n.4; and Gursaran Das v. Mohan Lal, (1923), I.L.R. 4 Lah.93, at p.97. Both these cases involved civil misappropriation and failure to account on the father's part; and the sons were held liable.
4. A.I.R. 1914 Mad.654.
5. Following Natasayan's case, cit.above, (p.215,f.n.1). This view has been approved in Hanmant Kashinath v.Ganesh Annaji, (1918) I.L.R. 43 Bom.612, at p.621

It is in this context, that Sadasiva Aiyar, J., despite his inclination to accept Colebrooke's rendering, has paraphrased (see above p.216) avyāvahārika debt in a round-about way. After referring to this and Justice Mookerjee's renderings with approval, in Gursaran Das v. Mohan Lal[1] (1923), where misappropriation and failure to account on the father's part was involved, the Court observed, "Every breach of civil liability does not necessarily involve a moral turpitude." This construction appears to make good sense, but this very essential requisite seems to be missing, or at least not apparent, in these definitions, and therefore they are open to various constructions.

In Ramasubramania v. Sivakami (1925), the question was whether in execution of a decree for mesne profits, the shares of the sons of the judgement debtor, in the joint family property, are liable to be attached and sold. After citing all the above mentioned definitions, and in view of the facts of the case[2] before him, Venkatasubba Rao, J. has given his own version (see above p.216) of what is meant by avyāvahārika debt. According to him, a debt is avyāvahārika, so as to enable the son to claim immunity, only "when the father's conduct is utterly repugnant to good morals, or is grossly unjust as flagrantly dishonest", but "if the debt is in its inception not immoral, subsequent dishonesty of the father does not exempt the son".[3]

It may be noted there that in the course of his judgement (at p.843) Mr. Justice Venkatasubba Rao has clearly stated that the question to be asked in such cases is, "Did the father

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1. op.cit., (see f.n.3, p.221), at p.98. Also, see Perumal Chetti v. Province of Madras, A.I.R. 1955 Mad. 382, at p.385. This was case of debts due to non-payment of Court-fee.

2. Ramasubramania v.Sivakami, cit.above, (p.216, f.n.2), at p.843.

3. Ibid., at p.845. Please note that the rules are stated here in reverse order.

contract the debt for an immoral purpose?" If this is the basic test, then it follows that whenever the father's debt is challenged by the son, the first question to be considered should be 'why' and not 'when' or 'how' he incurred the debt. Thus, in such cases, it would appear that it is by reference to its purpose, and nothing else, that the nature of the debt should be determined. Accordingly, applying the test that 'if the debt is in its inception not immoral etc.' to cases in which the father incurs debt by borrowing, would mean almost every such debt is binding on the son, even if the father spends it later for an immoral purpose. For there has to be some gap in point of time between taking of the loan and spending the amount. Or should we take it that the test is meant for only those cases wherein the liability to pay arises out of the father's misconduct; (for further discussion see below pp.225- 227).

The common-law method of ascertainment of the law by piece-meal application of juridical skill to individual sets of facts shows its weakness in a context such as ours. The learned judge had a particular set of facts before him and he was attempting to generalize from it without realising that obligation can well arise without any purpose at all!

Both his test and the definition of avyāvahārika have been criticized by the Full Bench of the Bombay High Court in the case of Govindprasad v. Raghunathprasad,[1] (1939). As regards the first part of the above rendering, Wasoodew, J. observed,

> "the attributes of morality, justice or honesty simpliciter, without more, forcibly convey the implication of the word avyāvahārikam. I think that interpretation of the word is the nearest approach to the intention of the law-giver, and does no violence to the rule of strict interpretation of an exception to a general rule according to Hindu law. In my opinion there is no warrant for restricting its application to criminal acts of

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1. I.L.R. (1939) Bom.533.

> the father. The word, according to my interpretation of the text, is used in a comprehensive sense and there is nothing to fetter the discretion of the Court in applying a proper standard of morality, legality or honesty in deciding the question of the son's liability. In fact no better or more elastic formula can be devised in the application of the rule in the circumstances of each case."[1]

The realism, modernity, and at the same time probable authenticity of this outlook, is obvious. It may, however, be said that Venkatasubba Rao, J. must have been conscious of the effect of this rule, for he has himself stated that the rule is not static and therefore subject to variation.

As regards the latter part, both Beaumont, C.J. and Lokur, J. have expressed doubts as to its exact meaning.[2] In the view of Lokur, J.,this

> "rule is somewhat misleading, and it is possible to conceive cases where it will be difficult to decide whether a debt was immoral in its inception or became so at the later stage. Thus for instance, if the father takes a bicycle on hire promising to return it, and if he dishonestly disposes of it and misappropriates the sale-proceeds, it will be difficult to say whether he took it on hire with a dishonest intention from the beginning or was subsequently tempted to sell it dishonestly."[3]

Thus, obviously, the weakness of the rule is apparent. Beaumont, C.J. thought, on the other hand, that

> "there can be only one relevant date to consider and that is the date on which was incurred the liability of the father which is sought to be enforced against the son. The question must be whether at that date the liability was of the nature alleged."[4]

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1. Ibid., at p.550. Both Beaumont, C.J. and Lokur, J. have expressed their disapprovals to the restrictive construction of avyāvahārika; see pp.543, 555 respectively.
2. Ibid., at pp.544, 554 respectively.
3. Ibid., at p.554.
4. Ibid., at p.544. Other two judges seem to have agreed with the chief justice.

It may be respectfully stated, however, that even this rule is not immune from criticism. Let us say, for example, that Rama borrows Rs. 100 from Soma today, with no provable intention of spending the money for illegal, immoral or dishonest purposes. Here it will be seen that on this date the act of borrowing or the consequent liability is not repugnant to good morals. But after a week he spends the money for spirituous liquors, which he drinks; and due to an overdose of the drinks he suffers a stroke. Now the question is whether his son is liable to pay his debts to Soma. It is possible that according to the smṛtis themselves Rama's son would not be liable, because the Hindu jurist would discourage the giving of credit for purposes not cleared from undhārmic intentions, i.e., the lender's not having ascertained that the money was needed for unobjectionable purposes is, under the heading of avyāvahārika, likened to cases where he specifically lent for immoral purposes. But according to the above alleged rule as to the date laid down by the Bombay High Court the son would be liable, and the same would apply to Venkatasubba Rao, J.'s rule which has been approved by the Privy Council in Hemraj v. Khem Chand[1] (1943). In spite of this approval, it may be said that this kind of test seems unnecessarily to complicate the issue of determining whether a debt is avyāvahārika or not; and at the same time such tests seem not only not warranted by the smṛtis but are in fact contrary to the spirit of the texts.[2] To obviate this situation, it has been suggested that

> "to determine whether a debt or liability is avyāvahārika we have to consider not only the nature of the act out of which the debt or liability arose, but also the nature of the purpose for which the debt or liability is in fact incurred and if either the act or the purpose is avyāvahārika the

1. (1943) 70 I.A. 171, at p.177, "It also appears to be clear on principle, and on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words when the liability was first incurred by the father. If on such examination, it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son."
2. L.J. Manjrekar, cited above, at p.10

> debt or the liability would be avyāvahārika; and it is immaterial to consider the time or the date on which the act is done or the debt is incurred."[1]

The same writer has stated that

> "if this test is accepted then in case of torts and crimes, it is the nature of the act which gives rise to the liability that determines the nature of the liability. And in case of debts ex contractu or quasi ex contractu it is the nature of the purpose for which the debt is incurred that determines the nature of the debt."[2]

To one who is acquainted with the piece-meal development of the case-law this is an attractive proposition. On the face of it, it appears to be a simple and easy way out, but unless we examine its true significance its acceptance may be unwise.

Let us suppose, for example, that the father criminally misappropriates a large sum of money and spends the whole amount in purchasing large landed properties. A small portion of this he gives to his continuously kept concubine, but the rest of the property remains in his joint family consisting of himself and his son. Now, while a suit for recovery of the amount is pending, the father dies, and the question arises whether or not his son would be liable. According to the above test (as well as on the authority of the Privy Council's decision in the case of Toshanpal v. The District Judge of Agra[3]) the liability of the father would be avyāvahārika, and hence not binding on the son. Thus, by accepting this test, therefore, we would be allowing Hindu sons to accumulate wealth out of the father's crimes without incurring any liability. Did the śāstras intend this result, and could this, in their view, be the meaning of avyāvahārika debt for

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1. Ibid., p.8. The words 'it is immaterial' are too strong. Read 'it is insufficient'.
2. Ibid., at pp.8-9
3. (1934) I.L.R. 56 All. 548 (P.C.); for the facts and the decision in this case, see below p.374.

the purpose of absolving the son from his liability to pay his father's debt?

It would appear that so far as that portion of the property which the father gave to his concubine is concerned, the śāstras would have certainly relieved the son from his liability. But as far as his liability in respect of the share he received in the property is concerned, though the śāstras are not quite clear on this point, it would appear from the practice followed in such cases that the son seems to have been made to reimburse such victims of the father's act.[1]

It is clear from the above example, therefore, that the application of the test, so far as it concerns determination of the nature of the liability arising out of the father's tortious or criminal acts, is inadequate in view of the śāstras or Hindu ideas of righteousness, to enable us to arrive at a satisfactory construction of such actions of the father as avyāvahārika or otherwise.

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1. In a case of 10-12-1677, reported in the historical records of the Pawār Family, where the father had, with others, killed a village Government officer and forcibly made away with a certain amount of revenue collected by the officer, it was decided that in the absence of his father, who had disappeared since, due to fear of reprisals, the son must not only repay the actual amount stolen but also pay compensation to the son of the officer for the murder. The amounts recovered were Rs 1260 and Rs 1240 respectively. Vide M.V.Gujar, 2nd edn., Pawār, Viśvāsrāo, Gharāṇyāchā Aitihāsic Kāgad-Saṁgrah, cit.above, pp.1-2; see Appendix II below.

   Also, there is a similar case, decided in 1610. It involved murders, forcible appropriation of property etc.. Although the son won his case in the end, it is quite clear from the statements of facts of both the parties in the case that the son was made to pay compensation and fine imposed on his father. See, Mahajara in re Jagadāḷe, cit.above at p.47, f.n.

   Also, the decision in Kartar Singh v.Harji Mal, (1879) P.R. No. 128, pp.282-83 is on the same line, (for details see above, p. 215, f.n. 2

As regards the father's contractual or quasi-contractual debts, if the purpose of such debts is proved to be avyāvahārika, i.e., tainted by moral turpitude, then undoubtedly such debts would be held avyāvahārika, and to that extent the test is agreeable to the śāstric precepts. Thus it may be correct to say that the above test is acceptable only in part, and therefore needs correction (see below p. 231).

Now mention may be made of the view adopted by the Allahabad High Court in 1926 in Jagannath Prasad v.Jugal Kishore[1]. In this case, the father, who was receiver of certain property belonging to others, managed it in an irregular manner and misappropriated some of it. It was held there that an element of criminality may be necessary to constitute immorality of a debt so as to enable the sons to escape liability. In order to ascertain what constitutes 'immorality' for this purpose, the Court has laid down that

> the test to be applied in cases where the father's liability arose out of an act of misappropriation by him,"is whether or not the action of the father which resulted in the debt was infected with an element of criminality."[2]

That is to say that 'criminal' is equal to 'immoral' which in turn amounts to avyāvahārika. In other words, 'criminal' means avyāvahārika.[3] The converse, however, may not necessarily be true; for avyāvahārika is much wider in its connotation than 'criminal', e.g., debts for spirituous liquors may, in the absence of any prohibition laws, involve no criminal element, but such debts are, in view of Hindu law, avyāvahārika.

1.(1926) I.L.R. 48 All.9

2. Ibid., at p.10.

3. In this respect there appears to be some misunderstanding on the part of Beaumont, C.J., for his Lordship seems to consider 'criminality' as a direct translation of avyāvahārika. In this context he remarked that it is "repugnant to good sense to construe ancient texts in the light of a system of criminal jurisprudence developed long after." Govindprasad v. Raghunathprasad, cit.above, (see p.223, f.n.1), at p.542.

Moreover, as regards the liability arising out of a criminal act of the father, unless the proceeds of the same were also applied for avyāvahārika purposes, the liability would hardly have absolved his son, in view of the customary Hindu law. For, in practice, historically speaking, such debts seem to have been extracted[1] from the son, particularly when proceeds from such acts were applied for the family's benefit. Besides, in the case of Kartar Singh v. Harji Mal, (1878), the father stole and converted to his own use certain property belonging to the defendant who sued and obtained a decree against the father for the value of the property. In execution of this decree joint family land was attached. His minor son brought the present suit through his guardian to set aside the attachment on the ground that the debt was contracted for an immoral purpose, but the Court held the property liable and sold it. The Court said,

> "it is impossible to hold that the debt created by the decree is a debt contracted for an illegal or immoral purpose, merely because the act from which the obligation to make compensation arose was an illegal or immoral act or both illegal and immoral."[2]

We may consider this view to be similar to what we have said above.

Then again, the test of 'criminal element' may seem to be an artificial one, particularly in view of the fact that modern legislation has created a large number of offences involving slight or no moral turpitude, i.e., offences under road safety Acts, or labour, factory or municipal Acts. Thus, for instance, in a case where rash driving of the father has led to his conviction and wherein the Court has ordered him to compensate the injured party, it might be difficult to

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1. The śāstras would no doubt expect the perpetrator to suffer for such acts (see Manu, X.91, cited above, at p.82). But in practice the son was made to pay (see above f.n.1 at p.227).

2. Per Plowden, J. at pp.282-283, in (1879) P.R., No.128, also cit. above, f.n.1 at p.227.

construe whether or not such liability was avyāvahārika, particularly if it was proved that the father drove his motor vehicle at an excessive speed in order to procure medical aid for his wife, child or anybody else seriously ill or who has met with an accident. A similar problem may arise in a case where an employer had employed knowingly an underage child in his factory's office as an office-boy, who, out of his own curiosity and without any knowledge of the employer, came into contact with the factory machinery and was seriously hurt. The employer is held criminally liable under the Factory Act, and is ordered to pay compensation. The factory being a joint family concern, his sons challenge the liability as being criminal and hence avyāvahārika. Now, the facts proved clearly show that the child belonged to a respectable but desperately poor family consisting of the boy himself, his widowed mother and two younger sisters The mother could not seek employment due to family as well as social tradition. There was no other source of income nor was there any relative to help the family. In these circumstances, and after repeated approaches to him, the employer had, out of sheer feeling of kindness, given the child perhaps the safest and lightest of jobs he could. In view of these facts, even if the father's act has offended factory legislation, his act could hardly be construed as one tainted with moral turpitude. Thus, the limitations of the above test are clear.

Of course, this does not mean that every criminal act would be morally untainted. What it means, however, is that such acts may or may not be so tainted depending on the facts of each case. But even then, in view of the spirit of customary Hindu law and justice, to construe the father's criminal act as avyāvahārika appears to be one thing, and so to do in respect of the liability arising from such act is another. For, as may be deduced from the above discussion, unless the purpose for which the liability was in fact incurred is also taken into account, the real nature of the liability

might not be properly determined. To construe a debt as avyāvahārika, therefore, it appears to be essential,[1] at least in appropriate cases, that both the nature of the father's criminal act and that of its purpose have to be taken into account. Otherwise, the test of criminal element would, as a principle, make it more attractive for a Hindu father to misappropriate other people's property;[2] and this would certainly be contrary to the spirit of the śāstras or for that matter that of any just law. In short, therefore, any definition of the term avyāvahārika should comply with both the spirit and practice of Hindu law.

The definition adopted by Beaumont, C.J. (see above, p.217) is a shorter and simpler version of Mr. Justice Venkatasubba Rao's definition with the adverbs omitted, and to that extent it gives wider scope to the meaning of the term avyāvahārika. While it has the merit of simplicity, it may be said that the definition does not seem to exhaust what avyāvahārika is intended to convey. According to both the dharmaśāstra[3] and arthaśāstra[4] avyāvahārika might include such an act of the father as the giving away of the entire

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1. In the case of Govindprasad v.Raghunathprasad, cited above, (p.223, f.n.1), their Lordships seem to have based their judgement on similar basis. The Chief Justice has said there at p.544, "I think, therefore, that the claim against him was in respect of a liability essentially dishonest in character, and incurred for a dishonest purpose." Hence the son was not held liable.
2. J.D.M.Derrett, C.M.H.L., cited above, p.104, f.n.2
3. Aparārka on Yājñ. II.175, see above, pp.170-71, f.n.2. Where we have discussed the views of various commentators on the dharmaśāstra and the arthaśāstra.
4. Kauṭ. 3.16.3, see above, pp.170-171, f.n.2.. Also see, Sham Singh v. Musst. Umraotee, (1813) 2 Select Reports, S.D.A. 92. In this case the father gave away whole ancestral property to his eldest son. The Court held "By Hindu law as current in Mithila (Tirhoot), a father cannot give away the whole ancestral property to one son, to the exclusion of his other sons." This view was affirmed in Musst. Junnuk Kishoree's case, (cit.above), at p.219.

family property when he has progeny. He might do this for a pious purpose, but even then that act, which may not be illegal, dishonest or immoral in a conventional sense, may still be avyāvahārika. The same rule applies to his debts.[1] The father's extremely extravagant act of ridding the family of its property, irrespective of its purpose, seems therefore, to have been construed by the śāstras as avyāvahārika.[2] It is this aspect of the term which is apparently absent from the definition of Chief Justice Beaumont.

Lastly, we come to the definition[3] adopted by the Privy Council in Hemraj v. Khemchand,[4] which the Supreme Court has subsequently affirmed.[5]

As noted above (see above pp.217-218), their Lordships of the Privy Council have merely approved the translation of the term avyāvahārika as given by Colebrooke; i.e., 'a debt for a cause repugnant to good morals', for, in their opinion, it makes the nearest approach to the true conception of the term as used in the smṛti text. The rationale of their Lordships' view seems to lie in that

(i) the son is liable to pay just debts of his father under the doctrine of Pious Obligation;

(ii) the doctrine has reference to the nature or character of the debt which creates the liability;

(iii) the duty cast on the son being religious or moral, the character of the debt should be examined from the standpoint of justice and morality;

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1. Ibid.
2. This śāstric view appears to be similar to the view adopted in the case of Devi Ditta v.Saudagar Singh (see above p.213, f.n.3). According to this a debt contracted as an act of reckless extravagance or of wanton waste or with intention of destroying other's interests in the property may be construed as an unjust or avyāvahārika debt.
3. See above pp.217, 218.
4. Cited above, (p.217, f.n.6). For the facts of the case, see below pp. 234-35.
5. In Luhar v. Doshi, see above, (p.217, f.n.7)

(iv) the examination of the nature or the character of the debt should be made with reference to the time when it originated;

(v) on such examination, if it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son. In other words such debt is not avyāvahārika;

(vi) the rule is not rigid, but has to be applied with reference to the circumstances of each case; and that these principles[1] should be kept in mind in interpreting the term avyāvahārika used in the texts.

In short, when a particular debt is called in question it will be the duty of the Courts to examine its nature in the light of these principles, which, in the view of their Lordships, are not exhaustive but only basic; and to see whether in the circumstances it is of the kind which will give exemption to the son from the liability of paying it, on the ground that it is repugnant to good morals.[2]

Seen in the light of the above, their Lordships' rendering clearly appears to be flexible enough to accommodate almost all cases of avyāvahārika debts; but at the same time its flexibility may well be the cause of continuing the present uncertainty and confusion that surrounds this controversial doctrine. For, when it comes to their application, these principles might well fail to be interpreted in the same way by different judges.

As regards the principles themselves, the first three and the last one seem apparently in keeping with the letter and spirit of Hindu law. But the same cannot be said of the remaining two, i.e., (iv) and (v). Principle (iv), in particular, has already attracted certain valid criticism. In the course of the discussion above (see p.222 ff) we have shown certain weaknesses implicit in this principle. Its

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1. Hemraj v. Khemchand, op.cit., pp.176-77.
2. Ibid., at p.178.

indiscriminate application may, therefore, lead in certain cases to consequences fundamentally contrary to the dictates of customary Hindu law, in that the son might be forced to pay a debt which his father might have in fact incurred for an immoral purpose. This may be explained by an example of a case with slightly different facts to those just discussed.

Let us suppose, for instance, a Hindu father is the secretary of a co-operative society. He is authorised to hold a certain amount of its funds in his possession for its day-to-day expenses. Normally a virtuous and respectable man, somehow he gets involved with a group of dancing girls visiting his village. He spends the society's money on costly saris and liquor for them with the intention of seducing a particularly beautiful one to have a sexual relationship with him. In a suit to recover the amount, the society obtains a decree against the father. But before the attachment of his joint family property, the father commits suicide as he could not stand the strain of loss of face due to the adverse publicity. In the circumstances could his son be held liable for his debt? Applying the above principle, he would be held liable for the debt which was incurred undoubtedly for an immoral purpose: a result which Hindu law expressly prohibits.

Turning, however, to the actual facts of the present case, namely, Hemraj v. Khemchand, it would appear that they warranted a slightly different approach in establishing the nature of the father's act and the consequent liability of the son. The facts[1] of the case were as follows: In a partition suit between Hemraj, Dhanpal and others, which was referred to arbitration with the result that a decree in terms of the award was passed by the Court, a promissory note executed in favour of Dhanpal for money advanced by him out of joint family funds was allotted to Hemraj. The award provided that the document should be filed in Court within seven days of the decree. Dhanpal did not do so, though he filed instead, without giving

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1. Ibid., at pp.172-173.

notice to Hemraj, another promissory note of 21.6.1926 which was a forgery. Hemraj filed his application for execution of the decree. Dhanpal then filed the original promissory note by which time it had become time-barred. Later, Hemraj filed a suit for the amount due under the aforesaid promissory note making Dhanpal a defendant besides its executants. The suit was decreed only against Dhanpal. It was admitted in the suit that the document of 21.6.1926 was a forgery. The proceedings showed that Dhanpal allowed the promissory note to become time-barred by acting fraudulently towards Hemraj. In the execution application taken out by Hemraj subsequently, to execute the decree in the above suit, the respondents who were sons of Dhanpal, since deceased, took objection on the grounds that since the debt was created by the misconduct and stupidity of Dhanpal, there was no liability on their part (they were survivors to Dhanpal's interest, burdened with debts binding on the family) to pay, and hence the ancestral property in their hands was not liable to be attached and sold. Both the subordinate Court and Allahabad High Court upheld the objection and dismissed the suit on the ground that the debt was avyāvahārika. Hemraj then appealed to the Privy Council. It is obvious that the facts provide excellent test for our so called principles. Was justice to be done to the party defrauded?

The main question to be decided was, therefore, whether the judgement debt in question was in the nature of an avyāvahārika debt which would be exempted from the respondents' pious obligation of discharging their father's debt.

In this case, the fact is that the father's act had, due to the operation of the law of Limitation, resulted in a certain loss to the plaintiff without any material benefit to the father or his joint family, the real beneficiary being the original debtors; a result which could hardly fit into the śāstric notion of releasing debtors from their indebtedness. But that is beside the point. The intrusion of the law of

Limitation, though material, was in fact incidental. The liability arose out of the father's deliberate act of allowing the promissory note, which remained in his possession after the partition, to become time-barred. No question of either borrowing money or spending of borrowed money for immoral purposes was involved. Nor was it a case of incurring the liability, as in the case of mesne profits, by way of taking any unlawful benefit out of the father's wrongful act. In a sense, therefore, the nature of the father's act in this case would appear to be similar to what it was in Durbar v. Khacher and Chhakauri Mahton v. Gangaprasad (see above p.219), i.e., merely to cause damage to other's property. It is the nature of this kind of act and its consequent liability which had to be determined.

The Privy Council judged the act of the father in the light of the principles laid down above (see pp.232-233), and concluded that the debt was not avyāvahārika. In their Lordships' opinion the debt was rightly due to Hemraj from the defendants' father, because in its origin the liability was just; and hence the sons were held to be liable.

Besides the above principles, their Lordships referred to Natesayyan v. Ponnusami[1] (1892) and Peary Lal v. Chandi Charan[2] (1906) in support of their decision. The learned Judges in Natesayyan's case, while describing the father's debt and the liability arising out of that debt on the part of his sons, observed that

> "upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a further state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father

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1. (1893) I.L.R. 16 Mad. 99
2. (1906) 11 C.W.N. 163.

> from the consequences of his vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, namely, to restore to those lawfully entitled money he has unlawfully retained."[1]

After quoting this observation with approval, their Lordships went so far as to state that the language of this principle

> "may well be used to describe appropriately the nature of obligation of the respondents in this case also, to discharge the debt brought about by the conduct of their father."[2]

Thus, they seem to have equated the nature of the son's liability in this case with that of the above two cases.

In view of the facts of these cases, however, the equation would appear to be misleading, for the above observation seems to refer to the general principle of morality regarding repayment of debts, and suggests that the son should pay what his father would have paid were it possible for him to do so. It should be noted, however, that the learned Judges have specifically referred in this connection to restoring to those lawfully entitled money he has unlawfully retained. (My emphasis). It would appear, therefore, that the principle enunciated in the above observation might be applicable only to those cases where the father has not only deprived others of their property, but also unlawfully retained it, probably for the purpose of enriching his own property. In fact, this is what had taken place in both the cases referred to above. We have an instance, however, where even if the facts were dissimilar, the above principle was relied on in the later case (1914) of Venugopala Naidu v. Ramanadhan Chetty.[3]

In Natesayyan's case, the father collected sums of money, on behalf of the plaintiff's family, but neither paid them nor accounted for them.[4] In Peary Lal's case, the father

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1. (1893) I.L.R. 16 Mad. 99 at p.104
2. Hemraj v. Khemchand, cited above, at p.179.
3. A.I.R. 1914 Mad. 654, at p.655, c.1
4. (1893) I.L.R.16 Mad. 99, at p. 104

became liable to pay a large sum of money because he had kept the owner out of possession of property which lawfully belonged to the latter, and to the profits of which he was entitled. Thus, by unlawful recept of these profits, the judgement debtor enriched his own estate which had later by survivorship passed into the hands of his sons. It is in view of these facts that the above observation was referred to and applied.[1] In Venugopala Naidu's case, the members of the committee of a temple unnecessarily expended the temple money and they were directed by the Courts to reimburse the temple with that amount out of their private funds; the plaintiff, having paid the amount himself, sued the legal representative, i.e., the sons of one of the committee members, along with the rest for contribution. Although the facts were different, the sons were held liable on the grounds of the general principle of morality laid down in Natesayyan v. Ponnusami. It would appear, however, from the facts of Natesayyan's case that the principle 'it is a sacred obligation to restore to those lawfully entitled the money unlawfully retained' would seem to apply, so far as the son's liability is concerned, only to those cases where the basis of the father's liability lies in his act of wrongfully depriving others of their property for the purpose of (and leading in fact to) unlawful enrichment of his joint family estate. Otherwise, the principle, as stated therein, does not seem to interpret the Hindu law correctly. For, as observed by Venkatasubba Rao, J.,

> "This statement does not correctly interpret the Hindu Law. Every debt, that is justly due, is not necessarily a debt, not tainted with illegality or immorality. --- The question is, did the father contract the debt for an immoral purpose? And the question is not : does not morality demand that the debt should be paid back? The mistake, if I may say so with respect, arises from a confusion of standpoints. There is hardly any debt, of which it can be said that it is not just that it should be repaid. But the Hindu law in dealing with the

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1. (1906) 11 C.W.N. 163, at p.169

> pious obligation of the son does not look at the question from this point of view."[1]

In justice, no one, the father or his son, should be allowed to take advantage of such unlawful gains. This is exactly what the administrators of customary Hindu law seem to have done in the past in such cases (see above p.226). But here the point is whether the case before the Privy Council falls under this category. Speaking accurately, it would not appear to be the case; for, as we have seen above (see pp.235-236), unlike the afore-mentioned cases, the act of the father in the present case resulted only in depriving Hemraj of a certain share of his property. There seems to be no evidence as to any real benefit accruing from the act either to the father or his sons - the respondents. In point of fact, therefore, the nature of such an act as this could hardly be the same as that in the cases referred to above, and hence the principle enunciated in the above observation may not exactly be applicable to this case.

The Privy Council's finding, based on principles (iv) and (v) (see above p.233), that the debt was true and just in its inception, seems to have led to no further inquiry on the part of their Lordships as to the real purpose of Dhanpal's actions leading to his indebtedness. It may respectfully be said that this judgement appears to be the result of an enquiry which seems to stop short of what the spirit of customary Hindu law would want the Courts to do in the process of determining the nature of the debt of the father. We have already noted above (see p.231) that in order to determine whether or not the son is liable to pay his father's debt it is essential to look into both the nature of his act as well as that of the purpose for which he committed the act. Had the Privy Council gone into this, supposing it to be possible, would it have come to any different conclusion?

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1. Ramasubramania v. Sivakami, cit.above, (see p.222), at p. 843, c.2.

As regards the nature of the act, if one looks closely at the facts of the case, it is abundantly clear from the findings of the lower Courts[1] that Dhanpal had all along been acting dishonestly and fraudulently towards Hemraj. These actions of the debtor, involving dishonesty, fraud and forgery, seem evidently immoral and illegal. But why did he act so?

"He cannot be allowed to take advantage of his cleverness and fraud"[2], said the Subordinate Judge in his judgement. Supposing, therefore, that the father had retained the promissory note for the purpose of recovering the amount from the original debtors for his own benefit, which might well have been his intention, in fact, and had really reaped the benefit; then, even according to the śāstras, both the father and after him his sons would have been liable for the amount. For, according to the Aitareya-brāhmaṇa VI.7 cited in the Mitākṣarā on Yājñavalkya II.127,[3]

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1. "It was admitted in the suit that the document dated June 21, was a forgery. The proceedings showed that Dhanpal allowed the promissory note to become barred by acting fraudulently towards Hemraj. In the course of the judgement the Subordinate Judge remarked: 'Dhanpal defendant has all along been acting dishonestly towards the plaintiff, and he cannot be allowed to take advantage of his cleverness and fraud.' --- According to the judgement of the High Court, 'Dhanpal had been guilty of dishonesty and grossly improper conduct.'" Hemrāj v. Khemchand, cited above (at p.217, f.n.6) pp.173-74. These extract taken from the statement of facts of this case would be sufficient to prove the point.

2. Ibid.

3. Mitā.I.IX,6-7; see also P.V.Kane, H.Dh., III, cit.above, p. 636; J.D.M.Derrett, at 1968 Adyar Library Bulletin 538, 553; Derrett, (1968) 2 M.L.J., J.41,50.
W.Stokes, ed., Hindu Law Books, (Mad., 1865), p.404. The same verse is numbered Yājñ.II.126 in V.N.Mandlik, ed.& trans. The Vyavahāra-Mayūkha and Yājñavalkya Smṛti, (Bom., 1880), p.218; S.S.Khedwal, ed., Yājñavalkya Smṛti with the Mitākṣarā (Bom., 1900), p.192.

> "Whoever debars or excludes from partition, an heir or person entitled to a share, and does not yield to him his due allotment; he, being thus debarred of his share, destroys or annihilates that person who so debars him of his right: or, if he do not immediately destroy him, he destroys his son or his grandson. It is thus pronounced to be criminal in any person to withhold common property, without any distinction of eldest (or youngest)."[1]

We may be correct, therefore, if we deduce from this commentary that (a) the act of withholding other's share may be considered to be a crime;[2] (b) that the liability resulting from the act may be attributed to the doer as well as his sons; and (c) that the criminal nature of the father's act by itself may not be sufficient to relieve the sons from their predicament, i.e., from their pious obligation to pay the amount so withheld by the father. In other words, even if the father's act is criminal, when it comes to determine the nature of the son's liability which arises out of that act, it would not, in view of the above rendering, be labelled as avyāvahārika. The principle underlying this rule might be applicable as well, by analogy, even to the cases in which the father has misappropriated a stranger's property. And, whatever might be

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1. H.T.Colebrooke, trans., Two Treatises on Hindu Law of Inheritance, (Cal., 1810), p.295; W.Stokes, op.cit., p.405,
   "Yobhāginam bhāgārham bhāgān nundate bhāgād apākaroti bhāgam tasmai na prayacchati sa bhāgānunna enam nottāram cayate nāśayati doṣiṇam karoti / Yadi tam na nāśayati tadā tasya putram pautram vā nāśayatīti jyeṣṭaviśeṣamantareṇa vā sādhāraṇa-dravyāpahāriṇo doṣaḥ śrutaḥ // "
   Vide, S.S.Khedwal, op.cit., pp.192-93.

2. The criminal nature of this kind of act is also apparent from Manu IX.213, "If an eldest brother, through avarice, defrauds the younger ones, he shall lose his 'seniority' and his share, and shall also be punished by the king."
   Vide, G.Jha, trans., Manusmṛti with the Manubhāṣya of Medhātīthi, vol.V., (Cal., 1926), p.177; also see, G.Bühler, trans., The Laws of Manu, S.B.E.25, (Oxford, 1886), p.377; J.D.M.Derrett, trans., Bhāruci's Commentary on the Manusmṛti, II, cit.above, p.264.
   "Yo jyeṣṭo vinikurvīta lobhād bhrātṛn yavīyasaḥ //
   So ajyeṣṭaḥ syād abhāgaśca niyantavyaśca rājabhiḥ // 213//
   Vide G.Jha, ed., Manusmṛti, op.cit.,vol.II,(Cal.1939), p.303.

the nature of his act -- criminal or civil[1], his son would, it seems, be held liable to restore it to its lawful owner. Looked at from this point of view, which is based on the śāstric position referred to above, the principle seems to support the rule laid down in Natesayyan's case (see pp.236-237), though for a different reason; yet it does not seem to apply to the situation in Hemraj v. Khemchand, because there the father has destroyed a certain share of Hemraj and not retained it as envisaged in the above examples. Only the original debtors, if anyone, seem to have gained from the action of Dhanpal. It is hard to believe, however, that Dhanpal acted the way he did for the benefit of his debtors. So, what else could be the purpose of his act?

Once again, let us suppose that Dhanpal wanted to punish Hemraj for bringing a family feud or differences to public notice by taking the matter to the Court. The disruption of the joint family might have led, rightly or wrongly, to undesirable gossip among relatives and the community. This might have annoyed Dhanpal. He might have taken it ill, thinking that the people might - or did in fact, look down upon him as the head of the joint family: a sort of disgrace deeply felt in Hindu society even to this day. Moreover, joint family partitions hardly lead, once separation occurs, to an amicable and peaceful relationship amongst the members, due to various reasons rooted in the partition. Whatever might have been the real reason, looking at the actions of

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1. As regards to the distinction, Seshagiri Ayyar, J. has observed that
   " the distinction between a civil and criminal breach of trust is very thin and it would not be easy in all cases to say whether the breach of trust is of a such a character as would not subject the father to a prosecution."
   T.K.Srinivasa Aiyangar v.Kuppuswami Aiyengar, (1921), I.L.R.44 Mad.801, at p.806; A.I.R. 1921 Mad. 447, at p.450; (1921) M.W.N. 630, at p.633.
   Also, Venkatasubba Rao, J. has said, "In my opinion, the distinction between a crime and a breach of a civil duty in this context is extremely artificial and finds no support in the texts of the Hindu Law." - Ramasubramania v.Sivakami, A.I.R. 1925 Mad. 841, at p.844, c.1.

Dhanpal, it may be suggested that he might have behaved the way he did towards Hemraj because he was annoyed and wanted to take revenge. Otherwise, a clever man would not normally allow himself to become liable for a large amount of money by deliberately holding back the promissory note so long as to render it worthless. Thus, if we accept that he incurred the liability due to his anger, then, in view of the śāstras,[1] his sons would not be held liable to pay it.

The śāstric injunction on the subject came up for the judicial scrutiny in Ramasubramania v. Sivakami.[2] According to Kātyāyana, "Having done an injury to another, or destroyed his things through anger, if anything is promised in satisfaction, it is called a debt for anger."[3]

After stating the above rendering, and after discussing certain important commentaries upon it, Venkatasubba Rao, J. said,

> "I would understand Kātyāyana's text to mean that the injury inflicted, or damage caused, should be the result of the wanton and flagrant violation of another's right from anger, engendered by malice or revenge, for instance, an act of incendiarism. To such and similar cases only, the text of Kātyāyana is applicable."[4]

Although the adjectives 'wanton' and 'flagrant' in this observation may seem to be unncecessary (see above p.223 where Wassoodew, J. says that these adjectives are unwarranted in this context), Dhanpal's behaviour towards Hemraj would hardly escape the description. Seen in the light of the above observation, Dhanpal's debt would appear to be avyāvahārika, provided that we accept (as it likely) that his behaviour was actuated and led by anger and his desire for revenge.

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1. Brhaspati, XI.51, Nārada, IV.10 and the explanation of these verses as appears in Kātyāyana, 565. For the texts and their translations and commentaries upon them, see above, p.153, f.n.1.
2. A.I.R. 1925 Mad. 841, at pp.846-7.
3. J.C.Ghose, Hindu Law, cit.above, p.546, *
4. Ramasubramania v. Sivakami, cit.above, (see f.n.2),p.847,c.1

* Also see Kātyāyana (Kane ed.,trans.) para.565.

Whether either of the above theories is correct or not is of little significance now, but it may be deduced from the above discussion that the Privy Council might have come to a different conclusion if their Lordships had inquired into the real purpose of Dhanpal's actions leading to his indebtedness. What is clear from the above discussion is, however, that the test laid down in rules (iv) and (v) seems to be of equivocal help and in some cases can be misleading.

An equally important principle, enunciated by the Privy Council, that "the duty cast on the son being religious or moral, the character of the debt should be examined from the standpoint of justice and morality" (see above, rule (iii) at p.232) requires some clarification.

We may ask, why did the Privy Council find it necessary in 1943 to give this directive to the Courts? Perhaps to overcome the confusion of various standpoints that led to different renderings of the term avyāvahārika, as will be seen. This is evident from the facts and decisions of the cases (discussed above at pp.219-232), which have attempted to define the term avyāvahārika debt. Thus, for example, the term avyāvahārika appears to have been construed in Durbar v. Khachar,[1] from the standpoint of the duties[2] of the father

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1. (1908) I.L.R. 32 Bom.348.

2. As regards to the duties of the father, Wallis, C.J. observed in T.K.Srinivasa Aiyangar v.Kuppuswami Aiyengar, (1921) I.L.R.44 Mad.801 at pp.803-4, that

   > "Any liability which the father may incur to the alienees on such unconditional setting aside of the alienation arises from his own immoral act in making the alienation in the first instance, in breach of the duty he owed to his sons as manager of the joint family property, and I do not think the sons can properly be held to be under any pious obligation to relieve him from the consequences of his unsuccessful attempt to defraud them."

   This view has been rejected by Madhavan Nair, J. (as he then was) in Ramasubramania v.Sivakami, A.I.R. 1925 Mad. 841, at p.852, c.1 in these words:

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of a family; while in the case of Chhakauri Mahton v. Ganga Prasad,[1] it seems to have been construed from the standpoint

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> "With very great respect, I am not prepared to accept this view of the son's liability. If the question is to be looked at from the standpoint of the father's duty towards sons, then the sons will be able to claim exemption from liability, in almost all the cases that may be brought against them."

It may be noted here that the reference that "The principle, laid down in Durbar v.Khachar --- seems to have been accepted by Wallis, C.J., in Venkatacharyulu v. Mohanapanda," etc. as given at p.851, c.2 is wrong. Chief Justice Wallis was not on the Bench which decided this case. As we know, the quotation comes from T.K.Srinivasa Aiyangar's case.

The facts of this case were as follows: It was a partition suit by the son against the father and his alienee. The Court found that certain alienations were not binding on the son. It held, therefore, that the son was entitled to get a decree for his share in the family properties without any condition being imposed on him to refund the consideration paid by the alienee to the father.

The decision in this case appears to have been based on the fact that no debt existed on the date of the partition. In the context of the peculiar facts of this case, and where it was not shown that the purchase money had been carried to the joint family assets, the stand taken by Chief Justice Wallis does not seem to be wrong. In fact, the question of what had happened to the purchase-money was neither raised nor was it discussed in the appeal. It is difficult, therefore, to opine as to the nature of the father's liability, which forms the basis of the son's pious obligation.

However, this does not mean that the view of Wallis, C.J. should be accepted as a general rule applying to all cases, and irrespective of their facts. Seen in this light, Madhavan Nair, J.'s criticism seems to make some sense. But at the same time, it should not be forgotten that in certain cases, at least, (see above p.232), the father's duty towards his sons and family does play its part in determining the nature of his liability.

1. (1911) I.L.R.39 Cal. 862

of doing justice to an innocent victim of the father's unjust act. In Natesayyan v. Ponnusami,[1] it seems to have been looked at from the standpoint of general principles of morality. These instances seem sufficient to illustrate the point. Of course, this confusion of various standpoints was already detected and commented upon in Ramasubramania v. Sivakami:[2] the case which seems to have considerably influenced the judgement of the Privy Council. It may, therefore, be correct to say that the observations made there on the confusion of standpoints might have led the Privy Council to lay down the principle of 'justice and morality'.

On the face of it, the principle appears to be simple and straightforward. But the significance of the term 'justice and morality' in general and that viewed in the context of the principles of customary Hindu law may not always be the same. For it may be true to say that under the principles of justice and morality generally, all debts should be repaid by the debtor, and the śāstras insist upon the observance of this rule. But, when the son of the debtor is called upon to pay the debt of his fahter, 'justice-and-morality' pertaining to the son's liability depends on the nature of the debt. Because of this crucial distinction between their respective liabilites, one should not confuse what may seem just and moral in general with what the śāstras would have considered

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1. (1892) I.L.R.16 Mad. 99.

2. Ramasubramania's case, A.I.R. 1925 Mad. 841.

Madhavan Nair, J. (as he then was) said, at p.852, c.2,

> "This conflict is probably due to a confusion of the various standpoints, from which the nature of a particular debt may be regarded, viz., the standpoint of the creditor, the standpoint of the son (virtually the debtor) and the detached standpoint of an outsider."

In the same case, above p.843, c.2, after referring to the general principle of morality laid down in Natesayyan's case, Venkatasubba Rao, J. said,

> "The mistake, if I may say so with respect, arises from a confusion of standpoints. There is hardly any debt, of which it can be said that it is not just that it should be repaid. But the Hindu law in dealing with the pious obligation of the son does not look at the question from this point of view."

It may be noted here that Mr.Justice Madhavan Nair himself delivered the judgement in Hemraj v. Khemchand.

as 'just or moral' for the purpose of repayment of the father's debt by his son. The distinction is further clarified by the Privy Council when it says,

> "In this connection regard may also be had to the debts mentioned in the texts which the son need not pay, most of which are of an objectionable character." [1]

Thus, it would appear from the above explanation that the significance of the term 'justice and morality' in this context should be limited to the scope of the śāstrically considered just debts of the father for which the son would be held liable under the doctrine of Pious Obligation. It is from the son's liability, perceived as above, that the Courts are expected, it seems, to examine the nature of the father's debt. Any other approach would therefore seem to be beside the point, and hence fallacious.

The above principles were intended to be of assistance to the Courts in interpreting the term avyāvahārika. They are not its actual definition. As we know, their Lordships of the Privy Council have, for this purpose, adopted Colebrooke's translation, i.e., 'a debt for a cause repugnant to good morals'. For, in their opinion, this translation "makes the nearest approach to the true conception of the term as used in the smṛti text, and may well be taken to represent its correct meaning."[2] But does it really represent its correct meaning?

It is respectfully submitted that it does not seem to do so, for the phrase 'repugnant to good morals' does not exhaust completely what the term avyāvahārika is śāstrically[3] intended to include. These may be debts for causes which are not repugnant to good morals, but which may still be avyāvahārika. For instance, if a father borrows a large sum

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1. Hemraj v. Khemchand, (1943) L.R.70 I.A. 171, at p.177.
2. Hemraj v. Khemchand, cit.above, at p.178.
3. Aparārka on Yājñ.II.175; Kauṭ.3.16.3, cited above, pp.170-71, f.n.2, also see above, p.231, f.n. 3 and 4.

of money, out of proportion to the value of the family estate, and gives it to a distant relative or donates it to a charity hospital, then it would be held to be an avyāvahārika debt,[1] although the act of the father is not repugnant to good morals. Thus, according to the śāstric conception of the term, avyāvahārika appears to have a wider significance than what is meant by 'repugnant to good morals' in English, and therefore this phrase cannot be taken to represent its correct meaning.

Besides, Colebrooke's translation appears to be vague in that we still have to consider what is repugnant to good morals, not in English but in Hindu terms. The meaning of the word 'immoral' or 'repugnant to good morals' would, moreover, vary with the times and also with the persons construing the words.

In spite of this being so, since the decision in Hemraj v. Khemchand in 1943 it appears to have been taken for granted by the Supreme Court that the issue of defining avyāvahārika is settled. For, following that precedent, the Supreme Court seems to have preferred Colebrooke's[2] rendering as the

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1. V.B.Raju, cited above, p.32. Also, he has suggested that in certain cases debts incurred by the father for a new business involving highly speculative and hazardous ventures would be considered avyāvahārika (see p.29 and 32). But the cases cited are not directly on the point, though it can be argued that such cases might be covered under 'gambling debt' and that by implication these decisions might lead us to the conclusion that debts due to such businesses would be avyāvahārika debts.

   Also, according to the Nagpur High Court,

   > "The word avyāvahārika does not merely comprise debts which are illegal or immoral only, but all debts which the Court regards as inequitable or unjust in point of Hindu Law to make the son liable."

   Vide Rajeshwar v. Mangniram, A.I.R.1933 Nag.89, at p.91.

   Also, the decisions in Devi Ditta v.Saudagar Singh, (1900) 35 Punj. Record No.65, p.291; and Sardari Mal v.Khan Bahadar Khan, (1899) 34 Punj. Record No.11, p.56 may fit into this category of debts, for the definition of a just debt adopted there need not necessarily be based on 'morality' alone. (See above p.213, f.n.3).

2. Jakati v.Borkar, A.I.R. 1959 S.C. 282, at p.286; and Luhar v.Doshi, A.I.R. 1960 S.C.964, at p.966.

definition of the term avyāvahārika. The Supreme Court has referred, in passing, to a few diverse renderings by others, but it has given no other reason for its preference except repeating[1] what the Privy Council had stated in this respect (see p.217-218) The Court's attitude seems to indicate, if one may say so, that it avoided any inquiry into its original sources to determine the exact[2] significance of the term. No doubt the facts did not require the court to make such an inquiry. The śāstras,[3] rather than what seems to be a defective precedent, would have been the proper place to look for help in respect of this question. In the view of the Supreme Court's authority,[4] however, it seems that all the Courts in India would be obliged not only to settle for something which is apparently less than correct, but also to perpetuate, perhaps unwillingly, this incorrect rendering. For, instead of solving, the Supreme Court seems to have simply buried the controversy.

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1. Ibid., at p.286, para.9, and at p.966, para.8 respectively.
2. In Luhar v. Doshi, after referring to certain other renderings of the term, the Supreme Court observed,
   "But it appears that in Hemraj v.Khemchand, ---, the Privy Council has, on the whole, preferred to treat Colebrooks's translation as making the nearest approach to the real interpretation of the word used by Uśanas; but whatever may be the exact denotation of the word, it is clear that --- as soon as it is shown that the debt is immoral the doctrine of pious obligation cannot be invoked in support of such a debt." (My emphasis). Ibid.
3. Perhaps, an effort in this direction could have been as valuable as it proved in respect of the father's power to make a gift of affection to his daughter of a reasonable portion of immovable property. Reference may be had in this regard to Guramma v.Mallappa, A.I.R. 1964 S.C. 510.
4. "The law declared by the Supreme Court shall be binding on all Courts within the territory of India." The Indian Constitution, part V, Art.141. One might conceivably call upon the much-cited Quinn v. Leathem, (1901), A.C. 495; (1901) H.L.1 again, however.

The real reasons for the difference of opinion among the Courts, as regards to the exact meaning of the term avyāvanārika, seem to lie in the following: (1) In view of their impression of the general nature of the listed debts, Colebrooke's translation of the term avyāvahārika debts seems to have led the English Judges to believe in the beginning that its significance amounted to that of the term 'illegal or immoral' debts in the sense in which they knew it from Roman law, as we have seen above (see p.196 ff). (2) Later on interpretation of what is 'illegal or immoral' in the Hindu law of debts on the one hand, and the common law approach, as opposed to that of an orthodox Hindu Court,[1] of ascertainment of the law by piece-meal application of judicial skill to individual sets of facts on the other, seem to have resulted in misinterpretation of the original term; for example see the cases which involved criminality (pp.229-231 above) or criminal and civil misappropriation discussed above (at pp.236-238). (3) In their well-intentioned efforts to ascertain the law, such discrepancies appear to have been overlooked and perpetuated by the Courts due to an unreflective application of the Common law doctrine of precedent[2]

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1. "The advantage of the old system seems to have been its deliberate reservation in favour of local custom at all levels of law-ascertainment, coupled with a general superstitious belief in the supersensory effects of failure to give truth its chance. The public's beliefs in justice therefore had several avenues leading from hope, and fantasy, into action. Social change and social control could correspond to local and even temporary needs, without the aid of the statutes, or of a class of interpreters of regulations or precedents - indeed there was no need for precedent as we know it."
   Vide J.D.M.Derrett, see G.Smith and J.D.M.Derrett, cit.above, Journal of American Oriental Society, vol.95, No.3 (Sept. 1975), p.417, at p.42o.

2. While dealing with a single judge's refusal to follow his High Court's Full Bench decision, the Supreme Court observed, "We cannot but deprecate this practice as it destroys the certainty of the law which the theory of judicial precedent seeks to establish." Vide Kamalammal v.Venkatalakshmi, A.I.R. 1965 S.C. 1349, at p.1358, para.21,c.1-2.

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and stare decisis.[1]

But with the passing of time knowledge of the śāstric implications improved and these discrepancies were brought

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f.n. continued from last page) (This case involved a question of inheritance of a congenital deaf-mute who was sole surviving coparcener.)
Cf. "The great boasts of the present system, viz.certainty and uniformity, though often belied in the progress of appeals and the High Court's divergencies in interpretation of the law, is conceivably enhanced when one considers what India had achieved under her own steam."
per J.D.M.Derrett, op.cit., at p.420, c.1-2

The practice of following precedents led judicial decisions to become one of the sources of Hindu law, and upon these the Courts were expected to rely more for their law than other sources such as śāstras or custom. It has been stated that

> "since the British occupation of India another element has been added, that of judicial decisions of Indian Courts and of Privy Council on appeal from them. The rulings of the Privy Council are final and it is only in cases not covered by such rulings that recourse need be had to other sources."

per Coutts Trotter, J. in Pudiava Nadan v. Pavanasa Nadan, A.I.R. 1923 Mad. 215 (F.B.), at p.218, c.1. (This case involved a question as to whether one congenitally blind was excluded from succession.)

However, as regards the authority of the texts and effects of judicial precedents, the Calcutta High Court has very recently held that,

> "Judicial precedents though founded on reasonable and logical grounds cannot give jurisdiction to Courts to change law as laid down in the texts of Hindu Law. A Court of law is concerned with application of the law to the facts of the case before it and while it has jurisdiction to interpret the law where the law is ambiguous or not clear, it has no jurisdiction to add to the law." See the brief note at p.380, c.2.

Vide, Milan Kumar v.Sm.P.Dassi, A.I.R. 1974 Cal. 380 (Special Bench), see pp.385-86. (In this case, in a partition between brothers, their mother's right to and quantum of share were the issues to be decided.)

1. "First and foremost in cases of this character the principle of stare decisis must inevitably come into operation."
per Gajendragadkar, J. (as he then was), in Luhar v.Doshi, cit.above, at p.970, para.17. Also see Venkanna v.Laxmi Sannappa, A.I.R. 1951 Bom.57; at pp.66-67 this principle is explained with the help of a number of authorities.

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to the Courts' notice; therefore the term avyāvahārika came, for the first time, under judicial scrutiny. The efforts of the Courts in this respect led, as we know, to various definitions of the term. This time, it seems to have so happened due to (a) diverse facts and circumstances, in the context of which the Courts were obliged to define the term, (see above pp.219-232); (b) Even if the facts were similar, they were looked at from different standpoints by different judges, (see above pp.244-245); (c) In some cases, confusion of general principles of morality as seen above at pp.237-239; (d) Certain definitions differing only in degree, e.g., see the definitions of Venkatasubba Rao, J. and Beaumont, C.J. (above p.231). Thus, besides the facts and circumstances of cases concerned, personal views of the judges

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However, as regards to the above view of the Supreme Court, J.D.M.Derrett, at (1964) 10 Lucknow Law Journal, p.1, has said "as the Supreme Court and indeed other Indian courts have repeatedly shown, there may well be grounds for departing from previous decisions if these are shown to be wrong in principle." Also, according to the same author, in his A Critique of Modern Hindu Law, cited above,

> "(1) precedents differ, and complete harmony is not to be found, even if it were desirable, which it frequently is not; and (2) in many fields, and especially family law, stare decisis either has only a moderate control, or controls only the framework, and not the details of the law." (see p.391, sec. 502).

It may not be out of place to refer to an instance in which the House of Lords has departed from the ratio decidendi of a former decision of the House, although it recognized the correctness of the actual decision in that case (i.e., Duncan v.Cammell Laird & Co.Ltd. (1942) 1 All. E.R.587. In this connection, Lord Morris of Borth-y-Gest observed,

> "Though precedent is an indispensable foundation on which to decide what is the law, there may be times when a departure from precedent is in the interest of justice and the proper development of the law."

Conway v.Rimmer, (1968) 1 All. E.R. 874, at p.892. (The case involved refusal to produce certain documents on the ground of Crown Privilege.)

Also see

Bengal Immunity Co.v.State of Bihar, A.I.R.1955 S.C.661; M.Chhagganlal v.Municipal Corporation of Greater Bombay, A.I.R. 1974 S.C.2009, para. 43-47; K.C.Dora v.G.Annamanaidu, A.I.R. 1974 S.C.1069, para.75-76. These cases, too, throw light on the subject; Maktul v.Manbhari, A.I.R.1958 S.C.918, para 9.

seem to have caused this diversity (a factor which one should hesitate - let it be admitted - to deprecate). (4) Like other terms which are intended to be of general application to various sets of facts, the term avyāvahārika is obviously very difficult to define precisely; and to that extent, this difficulty seems to have contributed to the diversity.

Before we put forward our suggestion in order to solve the problem, it may be observed that if the modern Courts still admit, as they do, that the concept of avyāvahārika is the same as in the śāstras, then for the purpose of its correct exposition, we would be justified in going back to the śāstric view.

As mentioned above (at p.218), we are not interested in each and every meaning of the word given by dictionaries. For,

> "In interpreting these 'Smritis' which were rendered thousands of years ago it is not safe to merely to take the dictionary meaning and apply it to the texts. In this connection it has to be remembered that these 'Smritis' also deal with religious and moral law. According to Hindu conception 'Dharma' is of widest significance and includes religious, moral, social and legal duties and can only be defined by its content." [1]

The term required to serve our purpose is therefore expected to be capable of representing, as accurately as possible, the whole significance which the śāstrakāras seem to have intended to attribute to the term avyāvahārika in the context of the son's religious and moral liability to pay his father's just debts. It should also be one which the modern Courts of law would find acceptable to meet the needs of the day without disturbing, as far as possible, the present position. We may recall what we have discovered while examining the śāstric position as regards the meaning of the term vyāvahārika, which is the positive from. This refers to those acts and values (whether spiritual, moral or otherwise) which were

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1. Per Kuppuswami, J. in J.Devaraja Rao v.Income-tax Officer, A.I.R. 1970 A.P. 426 (F.B.) at pp.429-30.

conventionally regarded as righteous or proper by contemporary society (see above pp.169-173). Avyāvahārika, the negative form, would therefore imply acts and values repugnant to those norms. It is suggested, therefore, that the term avyāvahārika debt may be defined as follows: A debt incurred by the father for an unrighteous and wholly improper[1] or immoral[2] purpose is an avyāvahārika debt. This rendering appears to be more accurate than the most favoured definition to this day, i.e., Colebrooke's. For it includes not only immoral debts of the father, but also those of his unjust debts which may not be immoral but which may still be avyāvahārika. It is in this sense that the term seems to have been used from the time[3] of the śāstrakaras to this day.[4]

We cannot claim, however, that even this definition would escape criticism. At the outset, it might be asked what exactly is meant by the terms 'unrighteous', 'wholly improper' or 'immoral'? We have already seen,[5] in the context of the term avyāvahārika, how one might be faced with difficulties in respect of defining such terms as these, and how they might reasonably be overcome.[6] In order to solve this sort of difficulty, Rajamannar, C.J. observed that

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1. "A debt incurred by the father for an unrighteous and wholly improper purpose is an avyāvahārika debt which will not be binding on the son." Vide M.Veera Raghaviah v. M.China Verriah, A.I.R. 1975 A.P. 350, at p.355. In this case the father incurred debts for prosecuting suits in order to defeat legitimate rights of his only son. Held, the son was not liable for the debts of his father.
   Also, see above p.248, f.n.1.
2. There is hardly any need to give any authority, for, debts incurred by the father for an immoral purpose have been held without exception to be avyāvahārika by all the High Courts, Privy Council and the Supreme Court.
3. See above f.n.3-4 at p.231 and f.n.1-2 at p.232, and f.n.3 at p.247 and f.n.1 at p.248.
4. See above, f.n.1 at p.253.
5. See above, pp.160-173, and also pp.249-253.
6. See above, pp.169-173, as well as pp.253-254.

> "the conception of Dharma and Nyāya changes, and the term avyāvahārika has to be applied to a particular case from the standpoint of notions of Dharma and Nyāya prevailing at the time of the dispute".[1] (My emphasis).

Likewise, the construction of these terms would seem to depend, in a given set of circumstances, on generally accepted notions of the people as regards what is 'right' and 'wrong' or 'just' and 'unjust', in view of prevailing social, economic, religious or moral convictions. One would expect, therefore, that, generally speaking, these terms should be construed according to the significance attached to them in the particular society of the day.

Moreover, the question of defining the terms would also be affected by the mental attitude of the judges[2] towards the father's conduct in incurring the debt and the degree of moral disapprobation it would invoke.[3]

Thus, the meaning of these terms might vary according to different circumstances as well as the mental attitude of the judges. In view of this, it would seem impossible to determine it exactly so as to be applicable to all sorts of cases.

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1. Perumal v. Province of Madras, I.L.R.1955 Mad.1179, at p.1187; or A.I.R. 1955 Mad. 382, at p.386.
   In this case it was contended that court-fee amounted to danda or fine. But it was held to be of fiscal nature, and it was not avyāvahārika, because there was no element of moral turpitude involved in it.

2. A good example of how this result would come about is the definition of the term avyāvahārika adopted (in Govindprasad v.Raghunathprasad, A.I.R.1939 Bom.289, (F.B.) by Beaumont, C.J. and by Venkatasubba Rao, J., (in Ramasubramania v. Sivakami, A.I.R. 1925 Mad.841), cited above, p.217.

3. "After all, in each case the decision of this question has to depend on the mental attitude of the judge and the degree of moral disapprobation it invokes. In such vague matters like this, only a general principle like the above can be laid down, leaving its application to the facts of each case and to the good sense of the judges, who have to deal with them."
   N.R.Raghavachariar, Hindu Law, cited above, p.346.

The terms could reasonably be ascertained, however, in a given set of circumstances. In this regard, it may respectfully be suggested that the judges intent upon enforcing properly the purpose of the provision of Hindu law, i.e., that an avyāvahārika debt of the father is not enforceable from his son, would do well, while keeping the exception within its proper scope, if, for example, they would free themselves in appropriate cases from their occasional rigid adherence to the principles of 'precedents' and 'stare decisis', and then determine in each case as to whether or not the father's debt is unrighteous etc. in the context of the son's liability on the one hand, and on the other hand, mainly with reference to the father's conduct, not as 'an ordinary man' in the sense of a sole owner,[1] but as 'the father of a joint Hindu family'[2].

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1. For, before birth of his sons, any Hindu could dispose of his property in any manner he pleased and afterborn sons could not assail his alienation either on the ground of immoral purpose or for want of legal necessity. Vide Dwarka Prasad v. Firm Lalchand, A.I.R. 1974 Pat.103, at p.112. In this case, afterborn sons challenged their father's alienations made before their birth. It was held that they could not succeed.

2. In connection with a manager's alienation, it has been said that

> "the degree of prudence which might fairly be required from a person who was not the sole owner of the property might naturally be somewhat greater than that which might be expected in the case of a sole owner";

per Boys, J. in Jagat Narian v.Mathuradas, (1928) 26 A.L.J.R. 841, (F.B.), at p.846.

Although the power of an ordinary manager and that of a father-manager differ according to Hindu law, in view of the above observation, it may be said that even the father who is not the sole owner would be expected to deal more carefully with the joint family property than a sole owner. Moreover, in accordance with the renderings by Bālambhaṭṭa and Aparārka (see above, pp.161-162) of the term avyāvahārika debt, a similar degree of caution in respect of his debts might well be expected from the father.

The following seems to support our view. Thus, while commenting on the tendency as to how the term avyāvahārika is presently defined, J.D.M.Derrett has said that

> "Today the most favoured explanation is that it is not so wide in its meaning as 'what a decent and respectable man would not

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It is here that the judges are expected to use their good sense and fulfil the intentions of the law-givers.

The charge of vagueness cannot be avoided altogether, but it can be said that this definition is no vaguer than others. In any case, a certain amount of vagueness is implicit in all definitions which are intended to be of general application to various sets of facts.

VI.3 THE EXTENT OF THE CONCEPT OF AVYĀVAHĀRIKA DEBTS

There appears to be some confusion as regards the scope of this concept. We have already noted above (see p.214) how the term avyāvahārika debts came to be regarded as 'illegal or immoral debts'. The Privy Council has also said that "debts in the nature of avyāvahārika are debts which would be comprised in the expression 'illegal or immoral' debts".[1] Most of the text-book writers[2] seem to acquiesce in this view, but very few of them have tried to explain why or what is precisely the scope of the term. As regards the expression 'illegal or immoral', Mayne says,

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> 'incur', nor so narrow as 'not lawful, usual or customary', what is contrary to public policy', but rather 'what is not customarily or properly incurred by a Hindu father of a family', being tainted by moral turpitude."

Vide I.M.H.L., cited above, at p.314, sec. 509.

1. Hemraj v. Khemchand, cited above, pp.177-78.

2. J.D.Mayne, Treatise on Hindu Law and Usage, cited above, at p.399; "The writers of the text-books use the two terms as comprising all the debts for which the sons are declared not liable." G.Sarkar Sastri, A Treatise on Hindu Law, 6th edn., (Cal.1927), at p.387; N.R.Raghavachariar, Hindu Law, cited above, at p.344; The term 'illegal or immoral' "expresses in a paraphrase the Sanskrit term 'avyāvahārika';" per J.D.M. Derrett, I.M.H.L., cited above, at p.313, (misleadingly); R.K.Agarwala, Hindu Law, 5th edn., (All.1971), pp.393-395; P.Diwan, Modern Hindu Law, 2nd edn., (All. 1974), p.270.

> "The expression was doubtless originally meant to render avyāvahārika, but it has come to be used as a compendious term to cover all the cases enumerated in the Smritis."[1]

However, his treatment of these debts seems to imply that there is some distinction between avyāvahārika and the rest of the enumerated debts. He has treated certain enumerated debts individually, and yet, without any explanation, he has discussed, under the heading avyāvahārika debts, cases of debts due to fine and concubine[2] which are themselves enumerated debts. N.R.Raghavachariar has adopted a slightly different method in that he has discussed all these debts in the section called 'Debts nor attracting pious obligation'. After dealing with commercial, surety and time-barred debts of the father, he seems to suggest that

> "The whole question can be considered under the term Avyāvahārika which may be adopted as a compendious expression describing the debts to which the pious obligation does not attach."[3]

Although he does not seem to differ in substance from Mayne his approach offers some explanation. Logically, all those debts which do not attract the son's pious obligation would be avyāvahārika, and in that sense the term avyāvahārika may be taken to include the rest of the enumerated debts in the smṛtis, but even this explanation does not seem to bring out the precise scope of the term.

According to J.D.M.Derrett this term represents "a definition of a residuary class of 'tainted' debts,"[4] such as, for

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1. J.D.Mayne, opp.cited, p.399.
2. Ibid., Sec.319-A, at p.405, f.n.(e) and (ei); Also, for a similar treatment see F.D.Mulla, 14th edn., cited above, at p.387, f.n.(e); N.R.Raghavachariar has also included debts due to fine in his classification of 'avyāvahārika debts' at p.345, (see No.6 - 'fines imposed as a result of criminal trial'.)
3. Ibid., at p.344.
4. Introduction to Modern Hindu Law, op.cit., pp.313-314.

example, those incurred in the course of an act punishable under the Penal Code or wagering contracts or highly tortious acts,[1] etc.. In other words, he appears to have excluded, by implication, all the other enumerated debts from the scope of the term avyāvahārika debts. His rendering appears to be substantially correct in the sense that all the debts, which do not fall specifically under any of the enumerated categories, but which have been considered to be outside the scope of the son's liability, have been held so on the ground of their being avyāvahārika.

On the other hand, seen in the light of its rendering particularly in the Smṛtichandrikā and Vyavāharaprakāśa of the Vīramitrodaya where it has been defined very clearly as meaning 'for liquor or drinking wine' (see above, pp.161-162) which is definitely an enumerated debt, it cannot realistically be denied that even the listed debts seem to be avyāvahārika. We have come to the same conclusion above while determining its scope in the section on the śāstric position (see above, pp.173-174). In fact, it would appear that the term avyāvahārika is wide enough to cover both[2] the listed debts as well as non-listed debts because of their unrighteous or immoral nature, and therefore, it might be appropriate to discuss the whole case law involving both the listed and non-listed avyāvahārika debts under the scope of this concept.[3]

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1. Ibid., at p.314, (Sec.510).
2. Besides the views of J.D.Mayne and N.R.Raghavachariar which we have already quoted; see also the following view as regards all the tainted debts: "The fact of the matter is that today there has remained only one broad head 'avyāvahāika debts." Vide P.Diwan, Modern Hindu Law, cited above, at p.270; "According to recent decisions debts for spirituous liquors, --- debts arising out of promises without consideration, surety debts, etc. are 'avyāvahārika' debts." Vide R.K.Agarwala, Hindu Law, cited above, at p.394.
3. In fact this has been done in F.D.Mulla, cited above, sec. 298, p.350 ff, or see its latest i.e. 14th edn., (Bom.1974), at p.385 ff; also, P.Diwan, cited above, at pp.270-272; R.K.Agarwala, op.cited, pp.393-394.

The father may be indebted due to actual borrowing of money or by way of some objectionable act on his part which has resulted in making him liable[1] to a certain amount of money. We have already noted above (see pp. 214-215) that the debts of the father by way of grossly extravagant expenses, imprudent transactions, fraud, misappropriation of other's property, decrees of the Courts for damages, mesne profits, costs etc. and even time-barred debts have been considered as falling under the category of avyāvahārika debts.

It is proposed, however, for the sake of convenience in discussing these debts, that they may be classified accordingly to their origin. Thus, the first two kinds of debts may be discussed under the debts due to borrowing; and the rest of them, except the last named, under debts due to some objectionable conduct on the part of the father. It may be noted here that it is neither scientific nor an exclusive classification, for, there might be cases, such as, for example, those involving costs, which might fall under either of these headings.

VI.3.1 CASES INVOLVING DEBTS ARISING OUT OF BORROWING OR IMPRUDENT TRANSACTIONS OF THE FATHER

(i) Debts due to the father's extravagant indulgencies.

The debts discussed here would be roughly those which the father had incurred orally or in writing, or by alienation

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1. "The word used in the text for debt is 'ṛṇa' which literally means a loan, but it is obvious that there is no difference in principle between a case in which a liability to repay is cast upon by actual borrowing and a case in which a person is bound to discharge an obligation created by a judgement of Court."

   Vide Raghunandan Sahu v. Badri Teli, A.I.R. 1938 All.263, at p.264, c.2. This was a case involving debts due for malicious prosecution. (See below p. 354 ff.)

of the joint family property to meet his extravagant indulgences and where such transactions were thought to be imprudent.

In several cases, in which the liability incurred by the father had been proved to be not for any legal necessity of the family, as will be seen below, attempts were made repeatedly to show that such debts were the outcome of the father's extravagant or immoral living and hence avyāvahārika.

To begin with, in Timmarah v. Vencapah[1] (1807), the son of an insolvent debtor was held to be liable for the payment of the decretal debt which was not found to be excepted by Hindu law. It appears that the decision was based on the Pandit's advice to the effect that if a father contracts a debt "for the purpose of spirituous liquor, or debauchery, or other improper objects, it is not obligatory on the son."[2] Although the precise nature of the debt has not been mentioned in the report it seems that it was not avyāvahārika. However, the importance of this, perhaps the earliest case reported on the subject, seems to lie in its indication as to which of the father's debts would be regarded as avyāvahārika. The term 'other improper objects', which appears to be synonymous with the term avyāvahārika (see also, p.212 above) would obviously attract our attention while discussing other cases in this section.

In Oomed Rai v. Heera Lall[3] (1851),

> "The sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate

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1. Vide here T.Strange, Hindu Law, II, 3rd edn., (Madras, 1859), p.456; also, see above at p.211, f.n.6.
2. Ibid.
3. 6 S.D.A. (N.W.P.) 218.

> created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate."[1]

The creditor appears to have succeeded in establishing his claim. Unfortunately, due to incomplete reporting of the case, we are unable to comment upon this decision. But after referring to this decision the Privy Council, in the famous case of Hunoomanpersaud Panday[2] (1856) has made certain observations which are worth quoting here:

> "Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By Hindoo law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."[3] (My emphasis).

Obviously, the emphasis on the nature of the father's debt in this observation would seem, by implication, to have reference to avyāvahārika debts. Our problem is, however, to find out how the Courts have treated debts due to extravagance or imprudence. The question came up for judicial opinion in Mussumat Junnuk Kishoree Koonwur v. Rughoonundun Sing[4] (1861). In this case the father, who was a young man

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1. The facts of the case quoted here as they have been stated by the Privy Council in Hunoomanpersaud Panday v.Mussumat Babocee Munraj Koonweree, (1856), 6 M.I.A. 393, at p.418. For, the reporting of the case has confined itself to that part of the decision which concerned to the point whether 'heirs should pay their ancestor's debts before they alienated any ancestral property'.
2. Ibid.. This case is concerned with the powers of a de facto manager (mother in this case) in connection with certain transactions with the ancestral property made in order to pay debts of a Hindu minor's father, deceased.
3. Per Lord Justice Knight Bruce, at p.421.
4. (1861) 1 S.D.A. (L.B.) 213. The question (as to whether the father's debts, due to extravagance, were of such a nature as under Hindu law to render the property in which the sons have a vested interest under no circumstances liable) was raised in 2nd issue at p.217.

and who had inherited a large estate - both movable and immovable, squandered almost all of it in a space of four years allegedly for the purpose of 'playing and toying'. A number of alienations of the ancestral property made by him were not for any family necessity. These alienations were challenged, on behalf of his infant son, on the ground that they were made without any necessity, but merely to satisfy his present extravagances. It was attempted to be shown by the evidence of witnesses that the extravagances of the father were of the nature of dissipations, for which under Hindu law, as being repugnant to good morals, the son would under no circumstances be liable, and therefore on this ground the sale of property in which the son has a vested interest was illegal.

However, the Court was not satisfied with the nature of the evidence adduced. It said that

> "all dissipation tends to extravagance, but all extravagances are not caused by dissipation repugnant to good morals in the Hindoo sense of that term, and nothing but the strongest and most reliable evidence as to the particular nature of the dissipation of the debtor, would justify our giving a verdict on the second issue in plaintiff's favour, and as no evidence of that kind is before us, we find for the defendant upon it"[1].

Now, it is clear that the Court attempted to find whether extravagance due to dissipation was avyāvahārika; and this it did in view of the definition of that term as given by Colebrooke. According to its findings, the father's debts, "though caused by extravagance, were such as a son would be liable for".[2] In other words, extravagance as such would not render the father's debt avyāvahārika unless it was also immoral. We have already shown above (see p.254) that the term avyāvahārika has wider meaning than 'repugnant to good morals'. In addition to immoral purposes, it includes unrighteous as well as wholly improper purposes on the part

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1. Ibid., at p.220.
2. Ibid., at p.222.

of the father. Looked at from this point of view on the one hand, and the size of the squandered estate as well as the short period in which it was squandered on the other, one wonders whether the extravagance of the father in this case, even if it would not have been caused by immoral dissipation, would justly be exempted from avyāvahārika. It does not seem to be.

In spite of its findings that the debts of the father were not for causes repugnant to good morals, after careful analysis of all the evidence, the court came to the conclusion that the father's liability which arose out of his own extravagance and not out of any legal necessity, would not, after all, bind the son's interest in those properties, the alienations of which took place without the intervention of the courts.[1] This result has been achieved, however, not with the help of any expressed principle of Hindu law, but with the help of the English law of Equity and Trust. The court observed,

> "Now in sales made without the intervention of a court of justice when the vendor is a trustee for others as well as part owner, and the purchaser a stranger, such purchaser is, as contended for by the learned Advocate General, under an obligation to enquire and see that no breach of trust is by the act of sale to him committed, when moreover, the purchaser is not a stranger, but a person knowing not only the position of the vendor, but the circumstances of the family, the obligation is stronger upon them of making such enquiry, and if the transaction, of whatever nature it may be, be afterwards called in question, the onus is clearly upon him of showing what those facts were which were represented to him, as raising the necessity, which was sufficient to justify it in his mind under the law applicable to the case.
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> "After an attentive analysis of all the evidence placed before us by the defendants, we are unable to say, that any such proof of a satisfactory nature has been placed before us by them in this case, but the doctrine has been openly adopted by them that the sales themselves prove their own ncessity; we think that this doctrine is altogether an erroneous one, and that on the simple failure

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1. Ibid., p.223.

> by them to prove that they had made any enquiry as to the legal necessity of the sales in either class of cases under consideration, this case might at once be decided against them; but on referring to the evidence of the plaintiff, the nature of all these transactions at once becomes apparent, and also the fact, that they were all without exception entered into without any legal necessity, considerable sums in the aggregate were paid over to the debtor, for which bonds to a large amount were given and decrees have been obtained on those bonds, and the transaction seems to have been part of a system entered into by certain parties, including the principal defendant, to ease plaintiff's father of his ancestral property by supplying his extravagances. The existence of a bond debt or a decree founded on it, are neither of them as a general rule sufficient to warrant a private sale of property partly held in trust beyond the amount of the decree or bond debt without the intervention of the court, and it follows a fortiori, that where there are neither decrees or bond debts, the sale of trust property at all can, under no circumstances, except those of strict legal necessity, be upheld by the court."[1]

After reading this judgement, one might ask whether the cause of justice could have been served better. Just though this judgement seems to be, it is based partly upon Hindu law and partly upon English law. (For the significance of these principles in Hindu law, see below the chapter on notice).

In short, according to the court, the debts of the father, arising out of extravagance but not caused by immoral dissipations, would not be avyāvahārika debts, and the son would be liable for them. However, the same debts would, it seems, be irrecoverable (in a modern version of avyāvahārika) in the sense that the son would not be liable for them, provided that the creditors did not make any enquiry as to the existence of legal necessity, or more so, if they knowingly conspired to supply his extravagance. Before going over to the next case, it may be mentioned here that the standard of evidence laid down by the court, for proving the nature of

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1. Ibid, pp.222-223.

a particular debt, appears (in the light of the law after 1856)[1] to be too high, particularly in the context of the facts of this case, though it may well be reasonable in certain other cases, such as those involving collusion between the sons and their father.

The Plaintiffs (sons) had alleged, in Girdharee Lall v. Kantoo Lall,[2] (1874) that the sale was made to pay debts incurred by fathers through extravagance and immorality, and to provide funds for the like purposes etc. The Principal Sudder Ameen had found that the Plaintiffs had entirely failed to establish that the debts contracted by their fathers were for an immoral purpose. According to him,

> "It is true that some of the witnesses have said that money was spent on dancing; but, from the peculiar habits of the people of this part of the country, spending a little money on festive occasions, to which this dancing was confined, is not reprehensible .... On these grounds the sales of properties which have been taken in execution of decrees, and by intervention of Courts, though for debts having their origin in extravagance, cannot be interfered with, as the sons are liable for such debts."[3] (My emphasis).

On appeal to the High Court, one of the Plaintiffs, Kantoo Lall, succeeded because the High Court found that "there was no evidence to shew that the fathers required to raise money for any pressing necessity, for the benefit of the family."[4] The Privy Council, however, restored the Principal Sudder Ameen's decision on the ground that the sons failed to prove that the debts were incurred for an immoral purpose. The Privy Council was, it seems, of the opinion that there was collusion between the fathers and the sons. Although hardly anything has been said by the Privy Council on the 'extravagant'

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1. See above p.262, f.n.2.
2. (1874) 1 I.A. 321 (P.C.).
3. Ibid., at p.323.
4. Ibid., at p.326.

origin of the debt, it might be correct to say that it, probably, was of the same opinion as that of the Principal Sudder Ameen.

In Suraj Bunsi Koer v. Sheo Proshad Singh.[1] (1879), the father was indebted not for any legal necessity but for mere purposes of extravagance.[2] According to the High Court, "The only necessity of Adit Sahai was his own improper and immoral way of life, which craved the expenditure of funds not derivable from his regular income."[3] These findings as regards the matters of fact were affirmed by the Privy Council, though it did not agree with the decision of the High Court.

The High Court held that the sons failed to prove that the decree for sale was improper. The rationale of the High Court's decision seems to lie in its following observation:

> "There are plenty of witnesses who depose to the fact that Adit Sahai was a young man of dissipated habits, was fond of drinking and natches, and spent a great deal of money; but none of them are able to give any particulars, of the debt for which the decree was given, or to show that the money advanced was to clear off debts of a disreputable character, so as to make the decree of the lender, who knowingly made such advances, an improper one."[4]

Thus, the High Court found the evidence insufficient to prove the sons' case because none of the witnesses could give any particulars of the debt, i.e., to pinpoint a disreputable cause for which the amount advanced to the father was spent. We may ask whether the facts and the circumstances of the case required this kind of proof. It was already overwhelmingly proved that not only there was no legal necessity, but also the father's debt arose out of his extravagant expenditure on immoral purposes. One would think it reasonable to expect, in the circumstances, that the witnesses should produce evidence of that nature such as that the debtor often visited drinking and gambling houses, or was seen always drunk, or spent most

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1. (1879) 6 I.A. 88.
2. As found by the trial Court, see ibid., at p. 89.
3. Ibid., at p.91.
4. Ibid., at p.92.

of his time and money in the company of natches or prostitutes; but to expect a witness to produce a receipt, for example, showing that a particular sum of money from the loan was paid by the father to a prostitute, would seem to be going too far, For how often would a man like Adit Sahai, who is infected by so many vices, leave behind the kind of evidence which the Court seems to have expected from the witnesses, particularly in a society which deprecated the kind of immoral acts he was involved in?

The Privy Council found that the ruling of the High Court was erroneous.[1] For, in the opinion of their Lordships of the Privy Council, the evidence, which was sufficient to prove that the original indebtedness of the father was for immoral purposes, would not be insufficient to prove the same against the respondents in this case.[2] This view of the Privy Council seems to indicate, though it has not said so in so many words, that to secure the son's interest generally, the evidence adduced by him need not necessarily be such that it should always prove the direct relation between the debt impeached and the alleged immoral act or purpose for which it was incurred or applied. However, the fact is that the controversy as regards the proof of direct connection between a debt of the father and an alleged vicious act on the part of the father continued, and therefore it has repeatedly attracted judicial attention.

Thus in Sadashiv Dinkar Joshi and others v. Dinkar Narayan Joshi and others[3] (1882) the sons (Plaintiff-Appellants) sued their father and the present alienee of their ancestral lands on the ground that the alienation was not binding on their shares. The lands were originally mortgaged by the father. Upon the suit by the mortgagee to realise his security, a decree was passed in execution of which the property was sold. The same property was resold to the present defendant no. 2. The father did not appear. The second defendant alleged collusion between the plaintiffs and their father.

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1. Ibid., at p.107.
2. Ibid.
3. (1882) I.L.R., 6 Bom. 520.

After referring to Girdharilall v. Kantoolall[1] and relying on the now famous propositions laid down in Suraj Bunsi Koer's case,[2] the High Court affirmed the decision of the lower Court on the ground that the sons "have not proved anything beyond the fact that their father kept a mistress, and have not proved any connection between that act and the debt in question."[3] Seen in the light of the alleged collusion, a showing by the sons of some connection between the debt and the alleged immorality would seem to be justifiable.

In Hanuman Singh v. Nanak Chand[4] (1884) it was alleged that the alienation in question was not binding on the son because Balwant Singh, the father of the minor plaintiff-appellant, 'indulged in prime of his life in immoral pursuits, gambling and extravagance, and consequently involved himself in debt: the creditors knowingly advanced loans for immoral purposes and extravagance. The defendant also lent money while Balwant Singh was in a state of infatuation, for defraying the expenses of gambling and licentiousness, as well as to meet other immoral expenditures',[5] etc.. The appellant's father was alive and lived with him and his mother in the same house. In view of the fact and due to the defendant's suggestion to that effect, the Court suspected[6] that the father

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1. (1874) 1 I.A. 321; discussed above at pp.265-266.
2. (1879) 6 I.A. 88; discussed above at pp.266-267.
3. (1882) I.L.R. 6 Bom. 520, at p.523, per Westropp, C.J.
4. (1884) I.L.R. 6 All. 193.
5. Ibid., at pp.194-195.
6. "Looking, however, to the fact that the plaintiff is a minor, who at the time of institution of this litigation was little more than ten years of age, and that he was then and is now residing at Meerut with his mother, in the same house as his father Balwant Singh, against whom he has by the plaint preferred such grave charges of profligacy and extravagance, there is certainly some ground for suspecting that Balwant Singh is at the bottom of this suit, as suggested by the defendant."
per Straight, J., ibid., at pp.201-202; Stuart, C.J., also came to similar conclusion; see ibid., at p.203.
It may respectfully be pointed out here that the mere fact of living together alone might not always be a good

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was at the bottom of this suit. Obviously this suspicion seems to have affected, in the main, the decision of the Court. We have two separate judgements from the two judges who decided this appeal. Neither of them, however, seems to have inquired whether building the house concerned was a necessity when it was actually built. Both of them have found[1] that the father was guilty of gross extravagance and grave misconduct, and that by the most reckless and profligate expenditure he had frittered away the entire ancestral estate. Mr. Justice Straight seems to have made a distinction between the general misconduct of the father and his application of the debt in question, and the son's inability to prove[2]

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ground for suspecting the plaintiff's bona fides in such suits. Even if the father is an immoral and extravagant man, he would rarely leave or would rarely be driven out of the family home for various reasons such as social, religious, economic or even moral, e.g., generally speaking, a Hindu wife would have hardly left her husband, particularly in those days, however immoral or extravagant he might have been. For, to her he was and still is supposed to be everything. Even if she disliked him, living apart would have been, at least socially, unbearable in most cases.

1. "The evidence given on behalf of the plaintiff no doubt goes far to establish gross extravagance and grave misconduct on the part of Balwant Singh, and the fact seems abundantly established, that by the most reckless and profligate expenditure he has frittered away the entire ancestral estate, which came to him on the death of his fahter Ranjit Singh."
per Straight, J., at p. 201.
"Balwant Singh's misconduct as a spend-thrift is fully proved." per Stuart, C.J., at p.203.

2. With reference to the statements of the several witnesses for the plaintiff, Mr. Justice Straight said,
"It seems to me enough to say that not one of them is able to speak as to the purposes to which the money borrowed from the defendant was devoted having been of an immoral kind in the sense of the Hindu Law."
Ibid., at p.201.

precisely that the loan was used for immoral purpose seems to have led him to decide in favour of the defendant. On the other hand, Chief Justice Stuart seems to have taken into account the father's recklessness and misconduct, which, in his view, led to the borrowing from the defendant and therefore found that the debt "was not of a faultless character."[1] Also, unlike his colleague, he was of the opinion that the burden of proof was on the defendant; and but for the suspicion as regards the bona fides of the plaintiff in bringing this suit, it would appear that the Chief Justice might have held in favour of the plaintiff.

Although the authority of this decision would seem to be rather weak, due to the different opinions of the judges, it has brought to the forefront, from our point of view, an important issue, i.e., whether or not the Courts should, in cases where the sons have failed to prove a direct connection between the father's debt and his immorality, take into account the father's general gross misconduct or his immoral behaviour while considering the nature of a particular debt when the debt was not incurred for any legal necessity.

In the case of Krishnaji Lakshman v. Vithal Ravji Renge[2] (1887) the father's mortgage of ancestral property led to sale of the property in execution of the decree obtained by mortgagee of the father. His son then sued to set aside the alienation on the ground, inter alia, that the debts were contracted for immoral purposes.

The son proved that the mortgage-debts were in fact contracted for immoral purposes. The High Court remarked, however,

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1. "Balwant Singh's misconduct as a spendthrift is fully proved by the evidence which has been taken, and more than one of the defendant's own witnesses speak to facts showing his character in this respect, and it is in my opinion perfectly fair to suggest that if it had not been for Balwant Singh's reckless extravagance ..., the money advanced to him by the defendant for the purpose of building the house mentioned in the pleadings would never have been required. The debt, therefore, to the defendant was not of a faultless character." per Stuart, C.J., ibid., at p.203.
2. (1887) I.L.R. 12 Bom. 625.

> "the case of those appellant-defendants who purchased at auction sales stands on a different footing. The Subordinate Judge has disallowed their claim as against the plaintiff's share in the lands sold merely on the ground that the sales were made in execution of decrees for debts contracted by his father for immoral purposes. But, in dealing with this part of the case, the Subordinate Judge has not considered the question whether the purchasers had notice that the debts were so contracted."[1]

This was in the opinion of the Court essential in a case such as this. The son's interest was saved, however, on the ground that the father's interest only was bargained and paid for, and not the son's; and thus, the Court would appear to have defeated the other principle of law which the Court had approved as essential for the purpose of deciding this sort of case. For, had the Court carried it to its logical conclusion, the son might have failed to save his share. Would not the rule of law, in this situation, be simply illusory if it could be so defeated? It seems so, and for that reason this decision appears to be a bad one.

In the case of Bhagbut Pershad v. Mussumat Girja Koer[2] (1888) certain ancestral property was sold in execution of a decree passed against three Hindu brothers in an action brought upon their bonds for recovery of a certain amount. Afterwards, the suit to set aside the sale was brought by the widows on their and their sons' behalf on the ground that the debts were incurred by their husbands during minority of their sons for immoral and licentious purposes.

According to the judgement of the High Court, it was proved that the debtors were leading a life of debauchery and sensuality; and if the lenders had made proper inquiry they would have found that the necessities of the loan arose from

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1. Per Parsons, J., ibid., at p.631.
   For this proposition the Court relied, perhaps wrongly, on the case of Suraj Bunsi Koer, (1879) L.R., 6 I.A. 88, cited above.

2. (1888) 15 I.A. 99.

their improper and immoral way of life. But the evidence adduced was not sufficient to establish that the debts impeached were actually applied to immoral purposes.[1] Even if this was so, it would appear that the High Court held in favour of the sons, due to the lack of proper inquiry on the part of the money-lenders, who had sued and recovered their judgements in the execution of which the sale took place. However, the Privy Council found the High Court's decision erroneous. For, in their Lordships' view, it was necessary for the sons, in this case, to prove that the debt was contracted for an immoral purpose, and it was not for the creditors to show that they made a proper inquiry,[2] etc.. It would appear that this decision affirmed that unless the evidence adduced by the son proved the direct connection between the debt and his father's immorality, he would not succeed.

The father in the case of Meenakshi Naidu v. Immudi Kanaka Ramaya Kounden[3] (1888) had incurred debts on a promissory note. The note-holder obtained a money decree against the father. The son of the debtor alleged that the debt was contracted for illegal and immoral purposes. The Judicial Committee of the Privy Council agreed with the findings of the High Court that

> "The income which remained for the support of the family was not large, and although the first Defendant may have been extravagant in his expenditure in proportion to his fortune, and have indulged in immorality, it is not shewn that the loan was taken with the intention that it should be expended in immoral purposes, or that it was so expended;" [4]

and, therefore, held that the son was liable for it. This, again, is a case in which the son seems to have failed due to lack of evidence showing direct connection between the debt and his father's immoral purposes.

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1. Ibid., at p.103.
2. Ibid., at p.105.
3. (1888) 16 I.A. 1
4. Ibid., at p.2

In the case of Chintamanrao Mehandale v. Kashinath[1] (1890) the mortgagee of the father sued for sale or foreclosure. The mortgage sued upon was executed to the plaintiff's father in 1878 by the defendant's father (since deceased). The defendant contended that the debt was contracted for immoral purposes, and therefore the ancestral property was not liable. He further stated that his father was of such vicious or extravagant habits that in 1868 he had published a notice in the newspapers warning people against lending his father money. It was proved by the evidence that the father was in fact a man of vicious and extravagant habits. It was therefore argued on behalf of the appellant (defendant) in the High Court that the onus of proof was shifted once the son had proved general immorality and extravagance of the father. Moreover, it was said that the creditor had notice of these habits, and ought to have inquired as to the object for which he was lending money.

Sargent, C.J., while delivering the judgement of the Division Bench, concluded as follows:

> "It has, however, been contended before us that the burden of proof was discharged by the defendant when he had established that his father was an extravagant man who kept a mistress and delighted in nautches, and that the onus was then shifted to the plaintiff of proving that this particular transaction was not for an illegal or immoral purpose. This is inconsistent with the rulings in Hanuman Singh v. Nanakchand, I.L.R., 6 All.193, and Sadashiv Dinkar v. Dinkar Narayan, I.L.R., 6 Bom.520, which are to the effect that some connection must be shown between the debt and the father's immoralities. This evidence was wanting, although it might perhaps be to some extent inferred from the evidence as a whole that the loan was used to minister to the father's extravagant habits."2

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1. (1890) I.L.R., 14 Bom. 320

2. Ibid., at p.327.
   It may be noted here that the decision has been cited with approval, not only as regards to the nature of evidence,

f.n. continued next page.

Now, looking to the facts of the case, particularly in view of the public notice given to all future creditors of the father, and in the absence of any collusion on the part of the debtor and his son, the onus of proof should have shifted, it seems, in order to avoid any injustice being done, once the son had proved that his father had all along been indulging in immoral pursuits. Moreover, the decisions relied upon here would seem to be of doubtful applicability; for, in both those cases, the High Courts had suspected collusion on the part of the father and sons.

The father of the minors, in the case of Bhavani Bakhsh v. Ram Dai[1] (1891) incurred debts to meet personal expenses which were beyond his means. Consequently the whole of the family interest in a certain Zamindari estate was mortgaged. When the creditors attached the property for sale, the sons objected on the ground that their shares in the property were not liable because of the immoral nature of the debt. The father died while the suit was pending. The creditor lived within two doors of the debtor.

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f.n. continued from last page) but also for showing the extent of the father's power of binding his son's interest in the ancestral property in the following cases:

(a) Joharmal v. Eknath, (1900) I.L.R., 24 Bom. 343, at p.345. In this case, a money-decree was passed against the father, and in execution of that decree ancestral property was sold at a Court sale. His sons obstructed on the ground that the house was their ancestral property. No illegality or immorality was alleged or proved. Held that the property was liable.

(b) Ramchandra v.Fakirappa, (1900) 2 Bom.L.R., 450, at p.452. The Mortgagee sued to realise loan to the father. No illegality or immorality or any legal necessity was proved. The sons (respondents) failed.

(c) Hurmukh Rai v.Narotam Dass, (1907) 9 Bom.L.R.125, at p.135. It was alleged that the father's debts were of wagering or speculative nature and hence illegal. On the son's failure to prove that they were so, the Court held against the son.

(d) Chandradeo Singh v.Mata Prasad, (1909) I.L.R.31 All.176 (F.B.), at p.225, (per Banerji, J.). In this case, the reference to the F.B. concerned the question as to what constituted 'an antecedent debt.'

1. (1891) I.L.R. 13 All. 216.

It was proved, on behalf of the sons, by oral as well as documentary evidence, that the father's debt was, in fact, incurred for immoral purposes; and that the creditors had knowledge that it was so incurred. The sons were held to be not liable for the debt. Looking to the facts of the case, however, one would think that it was not necessary, here, for the sons to prove the creditors' knowledge[1] in respect of nature of the debt. Of course, it did not harm their cause.

Although the decision does not seem to offer anything new, the description of money-lenders in general, given in the above context by Straight, J., while delivering the judgement of the Court, would be of great help to us. He said,

> "Then comes the question, had the defendants notice that they were borrowed for those immoral purposes? The learned Subordinate Judge has found that they had, and I agree with him that the creditor, not only in this case, but in ninety-nine cases out of a hundred, knows to a nicety the status and character of the father and of the family, the number of his children, his mode and way of life and the purposes for which he wants the money. The money-lenders in the towns and villages of these provinces never lend their money without the most thorough and searching inquiry into the character and antecedents of the borrower."[2] (My emphasis).

Also, this case appears to be a good example of how a crafty money-lender could encourage extravagance of someone, like the father in this case, by supplying money to meet his improper or immoral habits, in order to ease him of his

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1. "We know of no express authority for the proposition ... that a son who disputes his liability to pay his father's debt contracted for immoral purposes must ordinarily prove that the lender was aware of the object for which the money was borrowed."
   per Stanley, C.J., and Burkitt, J., see (1906) I.L.R. 28 All. 508, at p.521. For the facts and fuller discussion of this case see below p. 281 ff.

2. Ibid., at p.223.

ancestral property, without any concern for his family's welfare.

In the case of Narayen Shridhar Naik v. Jaganath Genesh[1] (1891), as regards to the facts of the case, it is stated that "Money was not borrowed for reasonable purposes, but for expenditure in vice,"[2] as found by the first appeal Court.

The High Court held in favour of the son. It said,

> "I don't think the son can be required to show that the money was actually spent in immoral purposes. It would be impossible when money is spent in vicious and immoral pursuits to trace out the items of expenditure and prove them. It is sufficient if it is proved that the money was borrowed for immoral purposes, that the father was spending money in debauchery and that there is no evidence to prove that the money was spent properly."[3]

It sounds a good decision, though, in the absence of the actual circumstances, we are unable to make any critical comment on this judgement.

Briefly the facts in the case of Khalilul Rahman v.Gobind Pershad[4] (1892) were that the father borrowed and spent a considerable amount of money for the needless and imprudent purpose of establishing one of the sons' having been given in adoption, in order to deprive the adoptive father's only daughter from succeeding to her father's vast estate. The subordinate judge had held that the expenses on the litigation "would come under the denomination of idle gifts",[5] and therefore, the defendants (other sons) ought not to be called upon to pay. However, the High Court refused to affirm this view, saying that

> "The exception has too long been limited to illegal and immoral purposes to justify us in introducing an extention of it, which would include transaction, the character of which was no more than 'imprudent', or 'unconscientiously imprudent', or 'unreasonable'.

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1. (1891), 4 CP.L.R., 29.
2. Ibid.
3. Ibid., at p.30.
4. (1893) I.L.R., 20 Cal., 328.
5. Ibid., at p.332.

> If it could be done in any case, it perhaps ought to be done in the present, in which a prosperous family has been ruined by litigation, in which defendants 2, 3, and 4, members of it, had no possible interest."[1]
>
> (My emphasis).

Obviously, in the absence of any authority from the previously decided cases, the Court declined to hold that the debt was avyāvahārika.

The fact that the prosperous family had been ruined due to the greedy father's sinister intention of gaining another's estate for one of his sons, by depriving the rightful heir of the estate, did not, in the view of the High Court, amount to an 'immoral act'; this would seem to be hardly justifiable, particularly in view of our definition of the term avyāvahārika (see above p.254). Their argument[2] to the effect that to hold avyāvahārika the money spent on useless and grossly imprudent objects would undoubtedly open a way of mitigating the effect of a course of decisions, would appear to be representative of unwillingness on the part of the judges, accustomed to the doctrine of precedent and stare decisis,[3] to be flexible, when they seem to have sensed that some injustice might result from their decision.

In the case of Vasudev Morbhat Kale v. Krishnaji Ballal Gokhale[4] (1895) the ancestral property was sold in execution of a decree against the father. The sons objected, in the suit for partition by the purchaser, on, among others, the ground that the debts were contracted for immoral purposes and not for the benefit of the family. In view of this, extravagance on the part of the father seems to have been implied.

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1. Ibid., at p.337.
2. Ibid.
3. For the effect of this tendency on the part of the judiciary, please see above clause (3) at p.250 and f.n.2 at p.250 and f.n.1 at p.251.
4. (1896) I.L.R. 2o Bom.534.

The High Court said,

> "There is no finding that debt incurred by the deceased father was for an immoral or illegal purpose. The onus of proving that was not shifted on to the plaintiff by proof of immoral habits."[1]

The Court relied on the decision in Chintamanrav v. Kashinath,[2] in spite of the fact that the facts of these two cases seem to differ.

The mortgagee in Kishan Lal v. Garuruddhwaja Prasad Singh[3] (1899) had sued both the father (the defendant-respondent) and his minor son for sale of the whole property mortgaged to him. One of the questions to be decided by the High Court in this appeal was whether the grounds on which the Lower Court dismissed the suit against the son were sufficient for giving the decision in favour of the son. The Lower Court had found,

> "that Garuruddhwaja is an extremely immoral and extravagant man, and that he has wasted property worth lakhs of rupees in a very short time. Therefore, the sons and grandsons of such a man should not be held liable for any debt incurred by him."[4]

But the High Court disagreed on the ground that "a mere general allegation that the father led an extravagant, immoral and licentious life would, even if proved, not be sufficient to relieve the son".[5] In view of lack of any evidence to show that the debt impeached and the debtor's immorality were directly related, the decision would seem to be a justifiable one. In this case the respondent (son) was not represented by counsel at the hearing of the appeal. Had he been so represented, there might have been something for us to comment upon.

In the case of Sheo Darshan Singh v.Sheo Bakhsh Singh[6] (1899) the mortgagee brought a suit against the mortgagor and

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1. Ibid., at pp.536-537.
2. (1890) I.L.R., 14 Bom. 320, discussed above at p.273.
3. (1899) I.L.R., 21 All. 238.
4. Ibid., at p.240.
5. Ibid.
6. (1901) 4 The Oudh Cases, 277.

his sons and grandsons for sale of the mortgaged property. The defence on the part of the appellants was that the debts were incurred for immoral purposes and they were therefore not liable to pay them.

At pages 278-279 of the report, the acting Chief Justice Mr. Spankie has recorded the oral evidence adduced on behalf of both the appellants as well as the respondent. The respondent's witness was the mortgagor himself. This would seem to exclude any possibility of collusion between the debtor and his sons and grandsons. If anything, it might suggest collussion between the plaintiff-respondent and his debtor. In answer to questions, "he stated that he contracted the debts for 'extravagance', and spent the money in buying clothes and paying dancing girls at the Holi and Diwali festivals, ... he used to give Rs. 200 or Rs. 400 to dancing girls."[1] On the other hand, all the witnesses on behalf of the appellants had stated that the debtor was a debauchee and licentious man, and spent money on dancing girls, prostitutes etc., though none of them had said that the money borrowed was the money so spent or named a particular prostitute.[2]

The High Court came to the conclusion that

> "proof of immoral habits is not proof that any particular debt was contracted for immoral purposes. The connection between the immorality and the debt must be proved."[3]

The decisions in the cases of Sadashiv Dinkar v.Narayan,[4] Chintamanrav v. Kashinath,[5] and Vasudev v. Krishnaji[6] were cited in support, respectively. Also, following Khalilul Rahman v. Gobind Pershad,[7] it said "Money borrowed to be spent extravagantly cannot be said to have been borrowed for an immoral or an illegal purpose."[8]

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1. Ibid., at p.278.
2. Ibid., at pp.278-279.
3. Ibid., at p.279.
4. (1882) I.L.R. 6 Bom. 520 discussed above at p.267.
5. (1890) I.L.R. 14 Bom. 320, discussed above at p.273.
6. (1896) I.L.R. 20 Bom. 534, discussed above at p.277.
7. (1892) I.L.R. 20 Cal. 328, discussed above at p.276.
8. (1901) 4 The Oudh Cases, 277, at p.280.

In the absence of any legal necessity, and in view of the evidence on both the sides to the effect that the debtor spent money on the dancing girls, it may be said that the evidence had proved conclusively that the debt fell under one of the listed debts, i.e., vṛthādānam. Accordingly, it should have been held, it seems, to be avyāvahārika, and therefore not binding on the sons. But in spite of all the evidence, the Court did not even think "that it is proved that Bisram Singh spent his money recklessly and extravagantly."[1] This decision hardly seems convincing.

In Ningareddi v. Lakshmava[2] (1901) the father had given a certain portion of the joint family property to his concubine for her life by way of maintenance. After his death, his son filed this suit to recover possession of the land. In view of the facts the concubine's right to maintenance was upheld, but the gift-deed of the father was held to be not binding on the son as the liability arose out of immoral purpose of the father.

However, an attempt appears to have been made to project the liability as a debt of the father, contracted to fulfil his moral obligation, i.e., a debt in the nature of compensation made to the woman by way of maintenance for the injury done to her by the past illicit cohabitation. While rejecting the argument, Chandavarkar, J. said,

> "That is the real nature of the liability, according to Gibson v. Dickie (1815) 3 M.& S.463. If, then, it is a compensation for injury done to the woman, it is a debt which sounding in damages is in the nature of a fine or penalty, which, according to the texts bearing on the subject, a Hindu son is not bound to pay."[3]

Although the argument was obviously based on the English decision, the way in which it was countered by the learned judge appears to be hardly satisfactory: he has construed the term compensation as a fine or penalty, perhaps, in order to keep the pious obligation of the son away from the liability.

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1. Ibid.
2. (1902) I.L.R. 26 Bom. 163.
3. Ibid., at p.170.

True, the nature of the injury or damage here had reference to immoral activities of the father and hence the nature of the liability arising therefrom was tainted, but there might be cases wherein compensation might arise out of a just cause or an honest mistake, and if the above construction is accepted, even just debts of the father would be excluded from the son's pious obligation, and that would not be Hindu law.

In the case of Maharaj Singh v. Balwant Singh[1] (1906) the facts, stated briefly, were as follows: The father died indebted to various creditors, leaving behind a large estate and two sons of whom one was a minor. The elder son contracted a loan to pay his deceased father's, as well as some of his own debts by mortgaging certain ancestral estate to a Bank. The minor son had signed the mortgage deed. The Bank assigned its rights to the plaintiff-respondent, Balwant Singh. He brought the suit against both the brothers on the sole basis of the mortgage; and no claim, it may be noted, was made, not even in the alternative, on the ground of the son's pious obligation to pay his father's debt.

Although Balwant Singh succeeded against the elder brother of Maharaj Singh, the High Court found that the appellant was under age and therefore, the Bank's mortgage was void and hence not binding upon him. Thus, strictly in accordance with the plaint, the case would have ended there, as the plaintiff (respondent) had failed in establishing the case which he had made in his plaint as against the appellant. In view, however, of the fact that the appellant in his defence had set up the case that the debts of Raja Shankar Singh, his late father, were immoral and an issue was framed on this question, so that it could not be said that the appellant was taken by surprise, the High Court did not think it just to take a narrow view of the plaint and thereby shut out the consideration of the important issue, i.e., the nature of the debts of the father. Thus, the Court allowed itself to examine the issue which was not in the plaint.[2] In this

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1. (1906) I.L.R. 28 All. 508.
2. Ibid., see p.518.

context the findings of the Court, in respect of the son's liability concerning immoral debts of the father, would appear, being obiter, to be of less value, but the good sense and plausibility of certain remarks of Burkitt, J. would certainly deserve[1] great respect and our careful attention.

It was contended on behalf of the respondent that unless Maharaj Singh could show that these debts were incurred for immoral purposes, and that the creditors who made the advances did so with the knowledge of the object of the loan, the appellant could not succeed. As regards this contention, after very careful scrutiny of all the evidence, the Court observed:

> "The evidence establishes beyond any question, and indeed it is not denied by the plaintiff-respondent, that Shankar Singh was a man of dissolute and dissipated habits. He squandered in a few years the accumulations of income made by his father, ... and incurred other heavy liabilites. No necessity for expenditure of moneys which the income of the estate could not satisfy is suggested other than that which might arise out of a dissolute and extravagant mode of life ... Now that a large part of moneys borrowed by Raja Shankar Singh were borrowed for immoral purposes there can be no doubt. His income was more than ample to meet his ordinary requirements, and in addition to his income he had the large accumulations amassed by his father. Experience tells us that his licentious mode of life was not and could not have been concealed from his neighbours. It was no doubt the common talk of the bazar. No intending lender could fail to have learnt of it if he had made any inquiry whatever. We know of no express authority for the proposition advanced by Mr. Sundar Lal that a son who disputes his liability to pay his father's debt contracted for immoral purposes must ordinarily prove that the lender was aware of the object for which money was borrowed, though there is the highest authority that he must do so if he is attempting to recover ancestral property which has already passed out of the family. If the onus of proving such knowledge lies on a son, it would be, we think, next to impossible for him to discharge it." [2]

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1. For a similar view, see J.D.M.Derrett, at Lucknow Law Journal, cited above, at p. 11.
2. (1906) I.L.R. 28 All. 508, at p.521.

Moreover, the Court has given (at pp.522-525) sufficient details of expenditure to show that the indebtedness of Raja Shankar Singh was due to his immoral course of life. According to the Court,

> "The moneys which he borrowed appear to us to have been undoubtedly borrowed for the purposes of his tours of lust and debauchery. The appellant does not profess to give specific proof of the expenditure in immoral pursuits of all the moneys which were borrowed, nor could he possibly do so. All that he professes to have done is to show specific instances of the application of large sums of money in payments made to prostitutes and in the purchase of liquor and to give general evidence from which it may, he contends, reasonably be inferred that the debts were tainted with immorality."[1] (My emphasis).

These observations of the Court prove their importance. Not only their considered opinion as regards the issues raised in the contention of the respondent, but also the manner in which the judges arrived at that opinion appear very valuable for the purpose of this discussion. Had the Court strictly followed the trend of decisions prevailing at the time, i.e., unless the son proves that the direct connection between the father's immorality and the debt impeached he would fail, it would have come to a different conclusion; for the son could have, as the judges have said above, hardly done so in the circumstances. The Court's opinion seems to manifest the kind of attitude which the Courts of law should adopt, in decisions involving cases such as this, i.e., reasonable flexibility. What the Court seems to have done in this case is that it followed the spirit of the Law, without ignoring its terms in that it paid reasonable attention to precedents but did not follow them blindly. In its opinion, circumstantial evidence positively proving the extravagant expenditure of money by the father on immoral purposes, in the absence of any proved legal necessity would seem to be of equal evidential value, in determining the nature of a debt, to that which

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1. Ibid, at pp. 525-526.

would prove that a particular debt was incurred for immoral purposes. Also, though it was, in their opinion, not necessary in this case for the appellant to prove the creditor's knowledge of the purpose for which the debt was incurred, the public knowledge of the father's immoral pursuits, it would appear, was, in their view, sufficient for any intending money lender to know or to put him on his guard before giving any credit to the father of the appellant.

Thus, finally the Court declared,

> "The evidence irresistibly leads us to the conclusion that there was no necessity for those debts or any of them other than that which the gratification of his vicious habits created. He had more than ample income for the maintenance in luxury of himself and his family. There is not even a suggestion of the existence of any family necessity for the loans. Under all the circumstances we think the appellant has made out his case."[1]

Whatever might be the place of this decision amongst legal precedents, it cannot be denied that it makes good sense.

In the case of Babu Singh v. Bihari Lal[2] (1908) two brothers had borrowed money by way of a mortgage of ancestral property. In the mortgagee's suit, their sons alleged that the debt was tainted with illegality and immorality. A prostitute was produced, in the Lower Court, who deposed that a certain amount of money was paid to her by one of the brothers. On the other hand, there was evidence to the effect that his daughter's marriage was celebrated about the time of incurring the debt. The High Court, following Kishan Lal v. Gururuddhwaja[3] and Chintamanrav Mehandale v. Kashinath,[4] held that even if there was some general evidence to show that the fathers were profligates, it was not sufficient to exonerate the sons of the debtors from their pious duty to pay their father's debts.[5]

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1. Ibid., at p.544
2. (1908), I.L.R., 30 All. 156.
3. (1899), I.L.R., 21 All. 238, this case is discussed above, p. 278 ff.
4. (1890), I.L.R., 14 Bom. 320, this case is discussed above, p. 273 ff.
5. (1908) I.L.R., 30 All. 156, at p.161.

In the case of Shri Sitaram Pandit v. Shri Harihar Pandit[1] (1910) an amount, paid by the father to the adoptive mother to induce her to adopt his son, was held to be illegal according to Hindu law, since the payment was vitiated by the fact that it was in the nature of a bribe; and therefore, the son was not liable. The debt for a bribe would undoubtedly be avyāvahārika. For even according to the śāstras a bribe was despised and any liability arising out of it was considered to be void or non-existent.[2] Such debts of the father, therefore, could hardly be vyāvahārika or binding on the son.

The case of Dattatraya Vishnu Dhamankar v. Vishnu Narayan Dhamankar[3] (1911) was a suit by the son for partition of certain ancestral properties in which he prayed for a declaration that incumbrances created by his father, by way of mortgage, were not binding as against him and on his share

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1. (1910) 12 Bom. L.R.910

2. "Adattam tu bhayakrodhaśokavegaruganvitaiḥ /
Tathotkoca parīhāsavyatyāsacchalayogataḥ // "
Nār.VII.9 quoted in the Vyavahāra-Mayūkha, vide P.V.Kane, ed. and trans., (Bombay, 1926), p.204. For translation see pp.372-74. At p.372 the word utkocha is translated as meaning 'bribe', and is one of the sixteen invalid gifts.
H.T.Colebrooke has translated the verse thus: "What has been given by men agitated with fear, anger, lust, grief, or the pain of an incurable desease; or as a bribe, or in jest, or by mistake, or through any fraudulent practice, must be considered as ungiven." Vide Digest, vol.II, cited above, p.181. J.Jolly has rendered these gifts invalid or void; see, J.Jolly, trans., S.B.E. 33, cit.above, pp.129-30. The translation by V.N.Mandlik is similar; see the Vyavahāra-Mayūkha, ed. and trans. by him, (Bombay, 1880), pp.123-24. Also,P.V.Kane & S.G.Patwardhan, trans., The Vyāvahāra-Mayūkha, (Bom.1933), pp.233-34.
The Vyavahāra-Mayūkha has also quoted the views of other śāstrakāras on the subject, see P.V.Kane, op.cit., p.205 and pp.374-75; V.N.Mandlik, op.cit., p.124; also see H.T. Colebrooke, op.cit., p.194; cf. Bṛhaspati XVI.11, i.e., "When anything has been given through desire of a reward ... or for an immoral purpose, the owner may resume the gift." Vide J.Jolly, trans., op.cit., p.343.
Bribe was generally considered to be a serious crime, and was severely punished. See, Vardhaman Upadhyaya, Dandaviveka, vide B.Bhattacharya, trans., (Cal., 1973), pp.86-88.

3. (1911) 13 Bom. L.R., 1161.

in the properties. He claimed that the debts were for immoral purposes such as the support of prostitutes and the expenses of natches and other tamashas.

As a result of this suit the mortgagees commenced their suits to enforce their mortgages. It was proved that certain sums were spent by the father for the support of a prostitute and her household and on jewellery and clothes for her and in the expenses of tamashas etc.. On the other hand, there was evidence to show that a considerable amount of money was borrowed for family ceremonies; and that the father and the son had suppressed the account books relating to family affairs which it was conclusively established were in existence prior to the date of the suit.

The High Court held in favour of the mortgagees on the ground that, although it had been proved to the satisfaction of the Court that the father was addicted to immorality and extravagance, there was no evidence of connection between a particular debt and the immoral expenditure.[1]

Although the law could have helped the son in this case, it would appear that he himself contributed to his own misfortune by suppressing the evidence. Then again, had there been only one creditor of the father, the Court might have been able to give some relief in proportion to the father's expenditure on his immoral pursuits. The difficulty, however, which might have led to this decision seems to be this that in view of two sets of mortgages, it was impossible upon the evidence to ascertain whose advances were applied for the benefit of the prostitute and the tamashas. In view of the facts, it might be correct to say that in the interest of proper justice, the proof of the connection between a particular debt and immoral expenditure of the father would be essential in cases such as this.

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1. Ibid., see p. 1166.

The case of Sri Narain v. Lala Raghubans Rai[1] (1912) was one in which two brothers incurred various debts, proved to be for family purposes, though there was some evidence to show that one of the brothers was of immoral character. His sons, the appellants, contended that he was spendthrift, debauchee, drunkard and imprudent, and therefore, their shares were not affected by his debts. As there was no evidence to connect the debts directly with the father's immoral habits, the Privy Council held that the sons could not succeed in this case.

In fact, looking to the dates at which the debts were incurred and the previous transactions to which they relate it would appear that they were not debts incurred for immoral purposes. This being so, unless some clear proof as to the connection between the father's immorality and his debts was shown, it would have been impossible to hold in favour of the sons; and hence this would seem to be a good decision.

However, application of the principle of showing direct connection between the father's debt and his immoral habits in the case of Dhulipallia Butchayya v. Kuppa Venkatakrishnayya[2] (1920) would appear to be not so convincing. For, in this case, it would appear from what was found by both the Lower Courts[3] that the father led an immoral life, that the income of the family was sufficient to meet its normal needs, and that there was no legal necessity to justify the father's debt on a promissory note. Although the sons could not prove which specific part of the debt was spent for immoral purposes, the circumstances of the case would seem to place some onus upon the creditor to prove for what purpose he lent the money. However, the High Court insisted upon the principle stated above and held against the sons.

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1. (1912) 17 C.W.N. 124 (P.C.)
2. (1920) 58 I.C. 797.
3. Ibid., see pp. 797-98.

Also, in Sundara Goundan v. K. Armuga Goundan,[1] (1920), where the mortgagee of the father had sued, the son alleged that his father's debt was incurred for an immoral purpose and therefore he was not liable. His father had kept a concubine. The father himself gave evidence to that effect. In the opinion of the High Court, however, the evidence was not sufficient to exonerate the son because no connection was established between the debt and any immoral or illegal purpose. It was necessary for the son, said the Court, to establish that connection. The mere fact that the father kept concubine was not sufficient. "It is sufficient, however, if the Court can draw an inference from the evidence as to the connection between the debt and the immoral purpose,"[2] said the Court. It would appear that in this case the Court had some reason to believe that there was collusion between the father and the son. Through his father, the son would have been able to produce evidence to prove the connection between the debt and the immorality.

In the case of Srinivasa Aiyangar v. Kuppuswami Aiyangar[3] (1920) we come across a slightly different point of view as regards the father's alienation of the ancestral property and the nature of liability arising out of it. This was a suit by the son for partition against his father and the father's alienee. No extravagance or immorality on the part of the father was alleged, but it was claimed that the son was not bound by the alienation. The alienation appears to have been made neither for immoral purpose nor for any family necessity. The Subordinate Judge found for the son subject to his refunding to the alienees the consideration paid by them to the father.

In the appeal by the son, the High Court gave him his decree without any condition. What is interesting, however, is that the judges who came to this conclusion, based their

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1. A.I.R. 1920 Mad. 968.
2. Ibid., at p.969.
3. (1921) I.L.R. 44 Mad. 801.

judgements on different grounds. According to Wallis, C.J.,

> "Any liability which the father may incur to the alienees on such unconditional setting aside of the alienation arises from his own immoral act in making the alienation in the first instance, in breach of the duty which he owed to his sons as manager of the joint family property, and I do not think the sons can properly be held to be under any pious obligation to relieve him from the consequences of his unsuccessful attempt to defraud them."[1]

This view, though strikingly different from what we have seen so far, would seem to amount to what Bālambhaṭṭa (see above p.220, f.n.2) meant by avyāvahārika. It may be noted, however, that this view did not, as will be seen presently, receive any support from the Courts of law. The judgement[2] of Mr. Justice Seshagiri Ayyar would seem to have been based on the following ground:

> "A son is bound to pay only such debts of his father as exist while they are joint; and a son getting a decree for partition becomes divided from his father as from the date of suit for partition. Any liability of the father to refund the consideration to the alienee arising as the result of the decree for partition is a liability for unliquidated damages and not a debt, and even if it becomes a judgement-debt it is not a debt existing on the date of suit for partition."[3]

Although this view would seem to be technically correct, it would hardly fit into the śāstric notion of the son's liability to pay his father's debt. Moreover, if accepted, this view might encourage cheating of creditors or distrust in the Hindu father's creditworthiness. None of the consequences would help serve the community.

In the case of Sheonarain v. Nathu[4] (1922) the father mortgaged ancestral property. His mortgagees brought suit to enforce the mortgages. No family necessity was proved. The father indulged in gambling, drinking and spent money on

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1. Ibid., at pp.803-804.
2. Ibid., at pp.804-809
3. As per the head-note given at p.802.
4. A.I.R. 1922 Nag. 1 (F.B.)

prostitutes. It was argued on behalf of the appellants that to claim exemption from his father's antecedent debts, the son must prove that the money borrowed was applied to immoral purposes. However, the Court was of the opinion that

> "such proof is not indispensable. The issue whether the debts were contracted for immoral purposes is one of fact and may be proved by inference from evidence showing that they were contracted during a period of extravagant immoral habits. But in such a case there must be definite and convincing proof that the immoral practices were contemporary with the loans and could not have been indulged in without the use of the borrowed amounts."[1]

It may be said in support of this view of the Court that it was proper in the circumstances of the case. For, there was no need to borrow for any family purpose; and, in spite of the father's known immoral activities, the alienees advanced huge amounts to the father without making any enquiry.

In Chet Ram v. Ram Singh[2] (1922) the joint family consisted of the father, Amar Singh, his sons and his sons' sons. The father mortgaged ancestral property largely for his personal purposes and later sold it to the mortgagees, again not for any family necessity. The plaintiffs were minors and sued through their guardian, Ram Singh. It was found beyond any dispute that Amar Singh was a man of extravagant habits, not leading a moral life and addicted to drink, who incurred this debt for his own personal purposes.[3] It was, except a very small portion, neither incurred nor used for family purposes or necessity, nor was it an antecedent debt.

The Privy Council held in favour of the minors on the ground that Amar Singh "had improperly and illegally sold

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1. Ibid., at p.4.
2. (1922) 49 I.A. 228.
3. Ibid., at p. 232.

the family property; and such a sale cannot stand."[1] It may be noted that in this appeal, although it was argued on behalf of the appellant that, the debt not being shown to have been incurred for immoral purposes, the respondents should be held liable; the Privy Council dealt mainly with the power of the father[2] in respect of alienation of ancestral property and the doctrine of antecedency; and came to the above conclusion without going into the question of immorality or otherwise of the debt. Perhaps, the fact that the vendor was a man of extravagant and immoral character might have affected this judgement, though there was hardly anything to support this suggestion directly.

In Tulshi Ram v. Bishnath Prasad[3] (1927) the father incurred debts and to pay back those debts raised a large amount upon a mortgage of ancestral property. The mortgagee obtained a money decree against the father. But his minor son challenged it on the ground that his father was a man of grossly immoral character and that the money taken by him, if at all , was spent on immoral objects. It was proved that soon after attaining majority the father had entered

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1. Ibid., at p.234. The Privy Council relied on its own decision in Sahu Ram Chandra v.Bhup Singh, (1917) 44 I.A.126, where the suit was brought to enforce a mortgage, not for legal necessity nor for an immoral purpose, though twenty seven years after it was granted. It was held that there was no antecedent debt; and the alienation was not supported by any legal necessity and therefore the father could not bind ancestral property as against his sons and grandsons, for, in the circumstances, his alienation amounted to a deliberate breach of trust.
2. The power of the father and that of a manager of the joint family seems to have been confused in these cases. For, in Brij Narain v.Mangla Prasad, (1923) 51 I.A. 129, the Privy Council laid down that, "(1) The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but (2) If he is the father and other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt." at p.139.

f.n. continued next page.

upon a reckless and extravagant career of immoral pursuits.[1] The High Court accepted the proof of general immoral character of the father about the time when this mortgage-deed was executed or even about the time when the previous antecedent debts were incurred.[2] But at the same time it was strongly of the opinion that the father was behind this suit,[3] which in their opinion was a collusive one. For the father had avoided going into the witness-box and had suppressed evidence by not producing his own account books which admittedly existed.[4] On the other hand, there was evidence showing that the mortgagee had made reasonable enquiries. In view of these circumstances, the High Court came to the conclusion that unless there was definite evidence to prove the connection between the debts and the father's immorality, the son's claim must fail. Considering the facts of the case, this would seem to be a good decision.

The question to be decided in Shyam Narain Singh v.Suraj Narain Pandey[5] (1933) was whether a general charge of immorality was sufficient to defeat the creditor's claim. In this case, the Subordinate Court decided the case in favour of the sons despite the fact that there was no evidence sufficient to connect the particular cases of expenditure directly with the act of immorality alleged. What seems to have been proved in this case, was that the father was leading a licentious life and living beyond his means, and that there

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f.notes, continued from last page)

In this case, the father of the plaintiffs (minor sons) had mortgaged ancestral estate to repay debts incurred upon two earlier mortgages of the same estate. It was not proved for what precise purpose the money raised by the two earlier mortgages had been used. The main questions to be decided were whether the payment of the earlier mortgages constituted an antecedent debt, and if so, whether the sons were liable for the same during the life-time of the father. The Privy Council answered both the questions affirmatively.

3. A.I.R. 1927 All. 735.

1. Ibid., at p.738, c.1.
2. Ibid.
3. Ibid., at p.737, c.1.
4. Ibid., at p.737, c.2.
5. A.I.R. 1933 P.C. 38.

was no legal necessity for the debts. In view of this it was argued that the sons

> "were entitled to the presumption that those loans must have been expended for licentious purposes and that it was not necessary for them to prove that each item was expended on an immoral purpose."[1]

Both the High Court and the Privy Council rejected this argument; but while doing so the Privy Council observed that the question was purely one of fact.[2] If that is so, then, it might be correct to say that in order to establish the facts, once the son has shown beyond any doubt that his father did in fact lead an immoral life, that he lived beyond his means and that there was no legal necessity for the debts, the Courts should insist upon the creditors at least to prove that they lent money bona fide. However, this observation seems unwarranted. This decision of the Privy Council might be one of the shortest of its reported decisions. The law report does not contain even the full facts of the case.

The case of Rajeshwar v. Mangniram Gangabisan[3] (1933) involved a mortgage of ancestral property by the father. The mortgagee obtained a decree against the father. The son who was impleaded in the suit as a defendant, appealed on the gound that his father led an extravagant life and was given to prostitution, and indulged in tamashas for which he contracted various debts. There was no legal necessity for incurring the debts except to meet his immoral indulgences. In fact, the father had in his permanent keeping a mistress, though there was no direct evidence to show that he spent extravagantly on her. The family income was sufficient to live comfortably. But, it was also found that the period during which the said debts were incurred was a bad period due to failure of crops, and therefore, the High Court had a reason to infer that the debts were incurred to maintain himself. On the other hand, since the death of his mother in 1919, the appellant lived with his maternal uncle. In other

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1. Ibid., at p.39, c.1
2. Ibid., at p.39, c.2
3. A.I.R. 1933 Nag. 89.

words the family expenses should have been reduced to that extent, but on the contrary, all the antecedent debts seem to have been incurred during 1919 to 1921. No collusion was alleged between the father and the son. The High Court began by stating that "it is not the character of the father but the nature of the debt which has to be proved";[1] and one would not generally object to that.

After discussing what is meant by the term avyāvahārika and the quantum of proof required to prove it, the Court said that

> "the connexion between the debts and the immoral habits of the father must be established ... In any case the burden is incumbent on the son to prove that the father was in the habit of spending his income in vices, that he incurred the debts for such purposes and that without incurring debts it was impossible to gratify his immoral propensities."[2]

It refused to presume that the debts were incurred for immoral purposes because in its view the proof of mere general immoral conduct of the father was not sufficient to do so. In any case the terms of these dicta seem too wide. A specific tainted debt suffices.

Now on behalf of the son it was proved that his father had kept a mistress, and that he caused some tamashas to be held in front of his house.[3] All this could not have taken place without some extravagant expense on the father's part. Could this expenditure be regarded as vyāvahārika particularly in view of the fact that the time when all this happened was economically bad? In these circumstances, the inference that the father incurred the debts for maintaining himself only would seem, in the absence of any concrete evidence to that effect, to be unduly cautious. The motive for this appears at once, for, in the end, the Court said, "It is quite possible

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1. Ibid., at p.90, c.2.
2. Ibid., at p.91, c.2.
3. Ibid.

that he could have avoided these debts by exercise of a little prudence, but mere imprudence does not bring the debts in the category of avyāvahārika debts."[1] To label the behaviour of the father in this case mere imprudence would seem to be quite disturbing, particularly when it was in fact (to modern eyes) quite immoral.

Moreover, the rule that the onus of proof lies completely on the son to the extent of proving the exact connection between the debt and his father's immorality, even when there was no collusion between the son and his father, would seem to give complete immunity to creditors from their duty to make proper inquiry as to whether the debt was required for any legal necessity. In this case, had the creditors made any enquiry, they would have hardly failed to know that the fahter of the appellant had a mistress or he was in the habit of holding tamashas in front of his house; for both these things must have been within public knowledge. It might be correct to say that the cause of justice would have been better served had the Court shifted the onus on to the creditors, once the son had proved his father's immoral activities, to prove that they lent money after enquiry and in good faith. It could be argued, on the contrary, as J.D.M.Derrett[2] has done in his 'Lucknow' article, that if the creditor could prove sufficient bona fide enquiry the question of pious obligation would never arise and therefore taint would not be seriously considered (such is indeed the effect of Hunooman Persaud's case). The answer is that this is not our contention. We allege that in order to prove specific taint the son having shown vicious activities on his father's part contemporaneously with the loan, the creditor to rebut the presumption thus raised must show that his enquiries at the time satisfied him, as they could have satisfied any reasonable person, that money was needed for an untainted purpose. For a man who squanders money on vicious proclivities is certainly likely to need money for private purposes of an indifferent character.

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1. Ibid., at p.92, c.1
2. See A.I.R. 1960 Journal 2-5 and 1976 1 M.L.J. 100.

In the case of Lingayya v. Punnayya[1] (1942), a case of significance, the father of respondents had sold ancestral property. They brought a suit after the death of their father to set aside the sale saying that the father was insane, that no consideration had passed and that there was no necessity for the sale. It was proved that the father was sane and consideration had passed but there was no necessity for the sale. Both the Courts below held in favour of the sons, hence this appeal. The main question to be answered concerned the son's pious obligation in respect of the liability arising on the sale being set aside by the Court: in other words, whether a debt incurred by the father for his own necessity, neither illegal nor immoral, by exceeding his power of alienation of ancestral property would be considered an avyāvahārika debt.

The Full Bench came to the conclusion that such a debt as in this case would bind the sons. It said,

> "the Hindu law makes no difference between a mortgage and a sale in this connection and therefore the fact that the father has abused his powers does not taint his obligation to the alienee to an extent which would justify the Court in holding that it is not vyāvahārika."[2]

This is a well considered decision, and one would not like to complain about it. But one might ask whether this rule would do justice, in the sense of Hindu law, in the case where the father exceeded his powers to the extent that the whole ancestral estate was lost due to his alienation purely for his personal purposes.

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1. A.I.R. 1942 Mad. 183 (F.B.).

2. Ibid., at p.186, c.2. Also see "It is therefore difficult to see how the fact that money was obtained for such purposes under a purported sale, so long as the object was neither illegal nor immoral can alter the character of the liability or convert the resulting obligation into an avyāvahārika debt." per Krishnaswami Ayyangar, J., at p.189, c.2.

The terms in which the rule is stated would seem to indicate that it is a flexible rule. For, the terms 'that the father has abused his powers does not taint his obligation to the alienee to an extent which would justify the Court in holding that it was not vyāvahārika' would seem to imply that such abuse of powers would attribute some taint to the father's obligation, though in this case it might have not been sufficient to justify the Court in holding that it was avyāvahārika. If the terms were used in this sense then the rule would seem to fit into the spirit of Hindu law, otherwise it could lead to destruction of the whole joint family property; and the result, as we have already noted above (see pp.231-32), would not seem to represent the correct position of Hindu law on the subject, particularly when the joint family consisted of the father and sons.

The case of Lakshmanswami v. Raghavacharyulu[1] (1943) was concerned with the father's debts, incurred for the purpose of meeting his concubine's grand-daughter's marriage. However, the Court below held that the debt was binding on the son because the creditor was a bona fide lender without knowledge of the purpose for which the amount was borrowed. Presently we are not concerned with the question of the 'lender's knowledge',[2] and therefore, it would be proper to deal with the question whether the debt was in fact avyāvahārika. The debt arose out of money borrowed on promissory notes by the father.

As regards to the nature of the debt, it was argued on behalf of the creditors that there was no clear proof that the borrowings by the father were for payment to his concubine; and that, even if the amount was paid to her, the purpose of the borrowings could not be regarded as immoral; for, she was in the continuous and exclusive keeping of the father and

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1. A.I.R. 1943 Mad. 292.

2. This problem, though we have occasionally referred to it in course of our enquiry so far, will be discussed thoroughly in the following chapter: see below p. 407 ff.

was thus an avaruddhastrī within the meaning of Hindu law texts, which recognise her status and provide for her maintenance[1]. It was also suggested that the father was 'morally' bound to meet the expenses of her grand-daugher's marriage.[2]

The High Court agreed with none of these contentions. Although there was no direct evidence that the sums borrowed were the identical amounts paid to the concubine, the circumstantial evidence before the Court was so clear that the Court could not resist holding that the amount was paid to her. As regards to the second contention, Mr. Justice Patanjali Sastri, while delivering the judgement of the Division Bench, said,

> "This argument is based on an obvious fallacy and cannot be accepted. The fact that Hindu law, like some other ancient systems of law, recognises and makes provision for certain human frailties cannot be taken as elevating them to the plane of good morals. Nor can the so called moral duty of a paramour to provide his concubine with funds to meet her expenses render his borrowing for the purpose a vyāvahārika debt as between him and his son."[3]

Thus, the Court held that the debt was not binding on the son. The decision would seem to be prima facie righteous according to Hindu law, even if the Court did not bother to cite any authority in its support. As the debt was for the purpose of the concubine of the father, undoubtedly it was avyāvahārika.

In the case of Shankar Rao v. Kamtaprasad[4] (1947) the father incurred, on the security of mortgage of ancestral estate, a large amount of debts from various money-lenders. The father caused a dispute with his brother in respect of the joint family property, and spent a lot of money in prosecution of the resulting Court cases. Also, he was given to drinking and debauchery. His sons claimed that there was no legal necessity but the debts were incurred for immoral

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1. J.D.M.Derrett, I.M.H.L., cit.above, p.422, Sec.671.
2. Lakshmanswami's case, cit. above, p.294, c.2.
3. Ibid., at pp.294-295.
4. A.I.R. 1947 Nag. 129.

purposes. Allegations that there was collusion between the debtor and his creditors, on the one hand, and that between the debtor and his sons on the other hand, were made. The sons suppressed the account books which were maintained by their grandfahter as well as their father. There was some evidence mostly in general terms showing that the father was given to drinking, and that he kept a mistress or two, but to what extent he spent money on them had not been made clear.[1] On the other hand, there was evidence to the effect that the family spent a considerable amount of money on a religious festival, when dancing girls from different parts of India came to the village and that a large expenditure was incurred on that account. However, there was nothing to indicate that there was any debauchery at that time.

After careful consideration of all the evidence the Court came to the conclusion that it was not sufficient to enable the Court to hold that the plaintiffs had discharged the burden of proof upon them to establish that the debts in question were incurred by their father for immoral purposes. It said,

> "mere proof of general immorality is not sufficient to discharge this burden; there must be proof of direct connection between the debt or the expenditure and the acts of immorality."[2]

In view of the facts of the case the decision would seem to be inevitable. For, in view of the fact that there were several creditors of the father, and that there were certain items of expenditure not falling under excepted categories according to Hindu law, it would have been impossible for the Court to decide otherwise, unless the sons could have shown that the loan from a particular creditor was applied by the father for his immoral purposes. Thus, the sons were made to suffer not only for what they were liable for, but also for something for which they could not have been liable.

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1. Ibid., at p.135, c.2
2. Ibid., para. 27.

In the case of Ramrao Shamrao v. Dattadayal Bishandayal[1] (1948) certain transactions entered into by the fathers (three brothers) were challenged by their sons on the ground that the debts were incurred for immoral purposes. One of the brothers was minor at the time of the transactions but he was later induced, through his mother, to a consent decree. In this case, the High Court dealt mainly with the question of res judicata, and then as regards the sons' challenge on the ground of immorality, observed that

> "under Hindu law the sons cannot challenge the antecedent debt of their father unless they can first establish their father's immorality and next establish some reasonable connection between the debt and the immorality that is to say, unless they can show that the debt was borrowed for immoral purposes."[2]

It would appear that in this case the issue of the consent decree of the father had attracted more attention of the Court than the alleged immorality of the father, and consequently the Court's findings on the first issue would seem to have affected the consideration of the second issue. In the end the Court held that proving general immorality of the father was not sufficient,[3] and therefore, the sons must fail.

The case of Ramamurthi v. Kuppuswami[4] (1950) involved debts of the father incurred by way of indemnity. The father of the defendants (sons) in this case executed a sale-deed of ancestral property in favour of the plaintiff's father. The main question to be dealt with was whether the liability to indemnify was an avyāvahārika debt as understood in Hindu law.

The High Court, after discussing certain cases as regards what is meant by an avyāvahārika debt, came to the conclusion that such a debt as this, "incurred by the father to help a third party whatever may be its magnitude is held to be binding

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1. A.I.R. 1948 Nag. 304.
2. Ibid., at p.307, c.2.
3. Ibid., at p.308, c.1.
4. A.I.R. 1950 Mad. 621.

on the son,"[1] and therefore, said the Court, "we hold that the debt is not a avyāvahārika debt."[2] According to the Court,

> "the only workable proposition and an easily ascertainable test is to find whether the liability of the father is tainted at the source. We will have to examine the nature and the character of the debt with reference to the time it originated, in other words, when the liability was first incurred by the father. So tested, can it be said that the liability of the father is tainted by immorality or illegality or incurring of the liability is grossly unjust or flagrantly dishonest?"[3]

Moreover, assuming that the father acted in excess of his powers, the Court observed that "the transaction may be imprudent and it may be even in abuse of his powers. But it cannot be said that that fact in itself makes a debt a avyāvahārika debt."[4]

Now, though the conclusion reached in this case would seem to be correct according to both the śāstric and modern Hindu law, the test to determine what is avyāvahārika would seem, as we have already shown above,[5] not to be universally acceptable or absolutely proper. Besides, the degree of imprudence or abuse of his power on the part of the father would seem to be material factors, as will be seen,[6] affecting the nature of his debts in certain cases.

In the case of Udmiram v. Balramdas[7] (1956) the son of a debtor brought the suit, through his next friend, for declaration that his father's debts, contracted by mortgaging ancestral property and on promissory note, were contracted, not for any family necessity, but for illegal and immoral

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1. Ibid., at p.624, c.2.
2. Ibid., at p.625, c.2.
3. Ibid., at p.625, c.1.
4. Ibid.,
5. For this (the discussion of Ramasubramania v. Sivakami, A.I.R. 1925 Mad. 841; and Hemraj v. Khem Chand, A.I.R. 1943 P.C. 142.) see above pp.222-224, and 232 ff.
6. See below p. 316 ff.
7. A.I.R. 1956 Nag. 76.

purposes, and therefore, not binding on the plaintiff's share in the ancestral property. It was alleged that the father had taken to gambling and certain defendants, who were involved in the gambling, themselves advanced him money and also caused loans to be advanced to him by the present appellants (defendants 1 & 2), to meet his gambling expenses. The Lower Court had found that all the debts were, as alleged by the plaintiff, incurred for purposes of gambling and therefore were not binding on the son. The defendants 1 & 2 appealed. In the appeal, the issue that the father was given to gambling was not seriously contested, but it was contended that the son had not established the connection between the debts borrowed by the father and his alleged gambling; and that the son had also to prove that the lenders had knowledge of the father's immoral purposes. Presently, as stated above, we are concerned only with the first part of this contention, for the rest will be dealt with in our chapter on the doctrine of 'notice'.

The High Court, after taking into account certain cases previously decided by the Court, as well as a decision of the Madras High Court, approved the view that

> "though it is not necessary to prove by direct evidence that the money borrowed is expended on the vice, yet it is necessary for the sons to establish the connection between the debt borrowed and the immoral habits of the father. And this can be proved by leading circumstantial evidence from which such an inference can reasonably be drawn."[1]

In view of this, the Court was of the opinion that,

> "if the sons are able to establish that during the period the debts were borrowed by the father he was indulging in a life of vice and that the life of vice could not be indulged in but for the borrowings and that there was no other necessity for the borrowings, and further if it is not established that the borrowings were utilized for some purpose which had no connection with the vice, then a reasonable inference can be drawn that the debts borrowed were for immoral

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1. Ibid., at p.79, c.1.

> purposes. It is not necessary for the sons to further establish by direct evidence that the debts borrowed were utilized to feed the vice."[1]

This, the son would seem to have done in this case; for he had proved that the family's income during the period of the borrowings was sufficient to meet its normal expenses, and there was, therefore, no legal necessity for the loans of the father, and that the only purpose which required the father to borrow was his gambling. There was no evidence to prove the contrary.[2] The Court held that none of the unsecured debts was binding on the son.[3] But its decision in regards to the secured debts of the father would seem to be controversial, because it held that, "the son cannot succeed without proof that the alienee was aware of the character of the debts."[4] Whether or not this rule applied to such cases will be discussed below (Chapter VII). It would be worth noting, however, that though there were various creditors of the father in this case, like the case in Shankar Rao v. Kamtaprasad, discussed above (see pp.298-300), the Court had no practical difficulty in deciding this case because all of the father's borrowings here were found to be incurred for immoral purposes, which was not the situation in Shankar Rao's case; and therefore, it seems that the Court was able to decide this case even in the absence of the son's proving a direct connection between each of the various debts of the father and his immorality. Thus, the application of the rule as regards the proof of direct connection between debt and immorality of the father to every case would seem unnecessary, and in some cases harmful to the cause of justice.

It was curiously contended in P. Bholaiah v. P.Budagaiah[5] (1958) that the debts, incurred by the father for the purpose of treatment of venereal diseases which he had contracted as

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1. Ibid.,
2. Ibid., at pp.80-81, paras. 30-34.
3. Ibid., at p.80, para. 25.
4. Ibid., see para. 21.
5. A.I.R. 1958 A.P. 89.

a result of his gratification of lust, were avyāvahārika, and therefore, not binding on the son. The father had sold ancestral property.

According to the High Court,

> "debts due for lust (Kāma) fall within the exception recognised by the ancient Smrithi."[1]

But, in its view,

> "there is a distinction between a debt incurred by the father for the gratification of lust and that incurred by him for treatment of the diseases which he had contracted as a result of such gratification. In the former, there is undoubtedly an element of immorality, ... But once a man is afflicted with a disease, no matter how it originated, it is essential that he should be given treatment in order that he should get himself restored to normal health. There is nothing immoral in the father taking a course of treatment for getting himself cured of diseases."[2]

Such a debt "cannot be classed as a debt tarnished or tainted with immorality."[3] The son was, therefore, held to be liable for the debt. Thus, the debt was held to be vyāvahārika. The decision would seem to be a correct one; for the debt represented the expenditure incurred by the father for the medical treatment which he had received.

In the case of Dwarampudi Nagaratnamba v.Kunku Ramayya[4] (1962) alienations of ancestral property by the father to his concubine were questioned by the sons on the ground that they were not supported by consideration nor were they for any legal necessity or family benefit. They were alleged to be made for the father's immoral purposes, and therefore, were not binding on them.

There was no legal necessity for the sale. It was found that the alienee had no means of her own to pay for her purchase of the property. According to the High Court, the father executed the sale deeds in view of his past cohabitation

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1. Ibid., at p.90, para. 10.
2. Ibid., para. 11.
3. Ibid., para. 13.
4. (1962) 2 And. W.R. 169.

with the alienee.[1] Thus, the consideration being immoral, it was held that the transaction was not binding on the sons. It would seem to be a correct dicision. Also, it may be noted here that in the course of its judgement, the High Court had observed that

> "when the sons call in question the alienations made by their father, it is always the duty of the purchaser to prove either that there was legal necessity in fact or that she had made proper and bona fide enquiry and did all that was reasonable to satisfy as to the existence of such necessity."[2]

Unfortunately, we have come across a number of decisions in which this duty of the alienee has not always been adequately put to test.

In the case of Moman v. Radha Kishan[3] (1974), the father of the plaintiff-respondent, a minor, sold ancestral property allegedly for household expenses and for the construction of a house. The facts proved on behalf of the son were, however, that there was no legal necessity whatsoever for the sale. The father was a drunkard and died of over-drinking. Also, there was nothing on the record to show that the vendee made any enquiry regarding the fact as to whether the vendor really needed money for the construction of a house. In view of these facts the High Court held that the appeal filed by the vendee failed and was dismissed. Surprisingly, no question was raised as regards the proof of direct connection between the amount raised by the sale and the father's immoral expenditure on his drinks. Thus, it might be correct to say, that in this case the mere circumstance that the father was a confirmed drinkard was enough, in the absence of any legal necessity for the sale on the one hand and that of any enquiry on the part of the vendee on the other, to invalidate the father's alienation, and therefore, the alienee's claim. This supports our observation regarding Udmiram (above).

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1. Ibid., at p.174.
2. Ibid., at p.174.
3. A.I.R. 1974 P.& H. 186.

In the case of Kandaswami Gounder v. Chinnamarimuthu Gounder[1] (1974) an alienation of joint family property made by the father was challenged, on behalf of his minor sons, on the ground that the debts for which it was made were avyāvahārika debts. Although the facts of the case have not been fully reported, it seems to have been alleged that the father was leading a wayward life and had neglected the minors. The evidence adduced on behalf the minors would seem to have been inconclusive. For, while rejecting the sons' claim, the High Court stated that

> "it must be positively established that the father not only neglected the interests of the family, in particular the minor coparceners, but also that he was openly and publicly leading a wayward life. Such immoral living must be testified to by witnesses whose testimony had to be compellingly acceptable."[2]

No mention is made here of the rule regarding direct connection between the debt of the father and his immoral pursuits. However, the circumstantial evidence required for sustaining the sons' claim is quite clearly expected to be so strong as to compel the Court to accept it. Of course, what evidence would be 'compellingly acceptable' to the Courts is difficult to predict for it would depend on the views of the judges as regards the quantity and quality of such evidence.

In the case of Thoga v. Suresh Chander[3] (1975) certain joint family property was sold by the father to the appellant who was his tenant. The son filed a suit for declaration that the alienation was invalid on the grounds that the sale was without any legal necessity or benefit to the estate; and that his father was a man of immoral character and had made the sale to meet his expenses for immoral purposes. The appellant had pleaded that he had invested huge sums of money to improve the land and that there was collusion between the plaintiff and his father in bringing this suit. The alienee's two sons were domestic servants at the alienor's house.

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1. (1974) 1 M.L.J. 11, (N.R.C.).
2. Ibid., c.1.
3. A.I.R. 1975 J.& K. 16.

It was proved that the debts were tainted with immorality, but the Lower Courts differed as regards the alienee's knowledge of the tainted nature of the debts. The fact that the alienee was a tenant and his sons worked at the house of the alienor led the lower Appellate Court to presume that the alienee had notice of the immoral nature of the debts.

However, the High Court disagreed for, in its view, there was no evidence on record to show that the alienee had notice of the father's immoral purposes. As regards this, the Court said that

> "even if it were assumed that the first defendant had knowledge that the second defendant was leading an immoral life, the question arises whether it should, therefore, be reasonably inferred that the first defendant was aware of the fact that the debts incurred by the second defendant were tainted with immorality. Here I must pause and say that there is ample evidence on record to show that the second defendant was in affluent circumstances having various sources of income; he had lands other than the disputed one which gave him rent and produce; he acted as a Prohit which naturally brought him the offerings; he worked as a P.W.D. Contractor which gave him some profits. Could therefore anybody imagine that he wanted debts to meet the expenses for immoral purposes? Obviously not. The inference to the contrary drawn by the learned District Judge is manifestly erroneous - the error lies in his failure to consider the circumstances mentioned above." [1]

The alienee's appeal was allowed on the ground that he had no notice of the debts being tainted with immorality.

Apparently, this was a case of no legal necessity. Also, the High Court found no reason, it seems, to disagree with the unanimous findings of both the Lower Courts as regards the immoral nature of the father's debts. Moreover, as regards the alleged collusion between the vendor and his son, no mention is made in the report as to whether or not it was proved; or, on the other hand, nothing is said as to whether the alienee made any enquiry.

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1. Ibid., at p.17, c.2.

In view of these facts, which were so dissimilar to those of Girdhari Lal's case (see above p.265), which laid down the rule as regards the son's onus of proving the purchaser's knowledge, one would be inclined to doubt the correctness of applying the rule in this case. The alienation was voluntary and not a Court auction sale. The alienee was not only a tenant of the vendor but also lived in the same locality as the vendor,[1] and therefore one would reasonably think that he must have known his character. Moreover, no stranger was involved in the transaction impeached. The circumstances would therefore show that in this case the son need not have to prove that the alienee knew about the father's immoral purposes. Strictly speaking, the affluent circumstances of the vendor, quoted above as described by the High Court, could be used to argue that the alienee should have known that the sale would not have been for any legal necessity, and hence he should have made sure before purchasing the lands that it was for a purpose which was not contrary to Hindu law!

As this was a case of an affluent landlord and his poor tenant, we may assume for the sake of argument that the vendor was a clever man who completely misled the vendee, which could not be ruled out in a case like this, and induced him to buy the property; and therefore, in order to avoid injustice being done to the vendee, the Court gave him relief in equity. But, in the absence of any enquiry on the part of the vendee, no such relief would be justifiable in this case; and the fact is that the Court dismissed his appeal specifically on this ground. In any case, even if this were a case of complete deception, to make the son liable under Hindu law for his father's proved immoral debts would seem to be erroneous.[2]

In the conclusion of this section, it may be observed that in most of the cases discussed above the father's debts arose out of his extravagance either due to his immoral pursuits or otherwise. In very few cases it was because of

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1. Ibid.
2. For a similar view, see J.D.M.Derrett, Lucknow Law Journal, cit.above, at pp.4-8.

his imprudent acts that the ancestral property was ruined. The sons almost consistently contended that such debts of the father were avyāvahārika, and therefore they could not, in Hindu law, be held liable. Perhaps the construction that the debts which are tainted by 'illegality or immorality' are avyāvahārika, might have prompted them to challenge the father's alienations made in excess of his legal power, i.e., transactions made without legal necessity. Or it may be that due to their philosophic and social background, in Hindu eyes even the extravagance as such of the father amounted to an avyāvahārika act particularly if seen in the light of the family circumstances. This view finds, as we have seen, a certain degree of support in the interpretation of the śāstric precepts on the subject, see commentaries of Aparārka (see above p.247, f.n.3) and Bālambhaṭṭa (see above p.220, f.n.2). However, this point of view would seem to have attracted hardly any attention of either the modern lawyers or judges. Presently therefore, 'immorality' alone would seem to have become the touchstone in the matter of deciding whether or not such debts of the father are avyāvahārika. Thus, under the influence of Colebrooke's definition of the term avyāvahārika, and that of its later version, coined by the Courts themselves, i.e., the term 'illegal or immoral' (see above pp.249-250), the modern Courts would seem to have consistently refused to consider such debts of the father as avyāvahārika unless it was proved that the debts were 'immoral' (see above p. 262 ff). Consequently, the sons have been effectively prohibited from setting up their rights against such debts of the father if not tainted with immorality.

Moreover, the fear that the father would use the sons' right of intervention to defraud innocent and bona fide creditors or purchasers, would seem to have gone far in the direction of practically abolishing the sons' coparcenary right by birth, by placing the sons at the mercy of designing and unprincipled creditors who may feed and stimulate the father's dissipation

and extravagance (see, for example, pp.275-276), and thereby impoverish the family, by relying in support of their conduct upon the pious obligation of the sons to pay the debts.[1] In fact, we have seen (see above pp.267-68, 281-273, 278-279, 286-88, 293-94, 301-03, 306-08, 310) that in many cases the sons could not succeed because they failed to prove direct connection between such debts of the father and his immoral pursuits, or the purchaser or creditor's knowledge of such immorality: the rules which would seem to have developed by the Courts to protect the purchaser or creditor of the father. Of course, in the case of real collusion between the father and his sons, such rules have their place, but their application irrespective of such collusions would seem to be unwarranted and therefore unjust (see for example, above pp.272-74 and pp.283-85).

On the whole, we may be correct in saying that although all such debts of the father could not be construed as avyāvahārika, there has to be some reasonable limit, depending on the circumstances of the family in each case, below which the father's debts incurred irrespective of any legal necessity and which were not proved to be for an unrighteous or utterly improper or immoral purpose, might be considered to be 'just debts'; but if his extravagant debts would go beyond that limit, then, not only in view of the commentaries of Aparārka (see above p. 247, f.n.3) and Bālambhaṭṭa (see above p.220, f.n.2) in respect of the term avyāvahārika, but also as considered in certain cases such as Devi Ditta's case (see above p.213, f.n.3) and Kandaswami's case (see above p.306) the liability in respect of such debts of the father might well be construed as avyāvahārika. Devi Ditta's case was concerned with the father's antecedent debts, not found to be illegal or immoral. In this case, the Full Bench has said,

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1. That such a result would obtain was expressly stated by Muttusami Ayyar, J. as far back as in 1881. See, Ponnappa v. Pappuvayyangar, (1881) I.L.R. 4 Mad. 1, at pp.36-37.

> "The words 'just debt' mean a debt which is actually due, and which is not immoral, illegal, or opposed to public policy. It also means a debt not contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interests of the reversioners as laid down in Sardari Mal v. Khan Bahadar Kahn. It need not be one incurred for a necessary purpose, but we think that if a non-necessary debt is unreasonably large compared to the means and station in life of the proprietor it cannot come under the definition of a just debt. Similarly, if a number of comparatively small loans for non-necessary purposes are contracted within an unreasonably short period they collectively may amount to extravagance judged by the tests previously mentioned, and may be excluded from the category of just debts."[1]

Thus, for the purpose of determining the nature of extravagant debts of the father, in the context of the son's liability, such debts of his should be looked at, it seems, from both their quantitative and qualitative aspects. Quantitative means their size in the context of the circumstances of the family; and qualitative implies considering them in the light of contemporary conventional ethical and moral values of the society, i.e., whether or not they are of righteous or unrighteous, moral or immoral nature.

(ii) Commercial debts.

We have so far dealt with the cases in which the father's liability to pay others arose out of his borrowing or as a result of his alienations of joint family property mainly for his personal purposes which were thought to be of avyāvahārika nature. Now, we will turn to his debts which were not incurred exclusively for his personal purposes, but which were alleged, and in certain cases were held, to be avyāvahārika. These were the cases, among others, which involved his debts concerning his trading or commercial activities, or transactions of speculative nature. As will be seen presently, the term

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1. (1900) 35 P.R. (No. 65), 291 (F.B.), at p.296. The point of view no longer represents Hindu law on the subject, see below, p. 312 ff.

vaṇik-śulka, used by Gautama,[1] seems to have been wrongly relied on for the allegation that such debts of the father were avyāvahārika.

Although the son's liability to pay his father's debt due to usual trade or commerce had been already recognised by the Court,[2] attempts were made to show, relying on the text of Gautama, that such debts were not binding on the sons. Thus, the question was for the first time raised in 1925 in the case of Achutaramayya v. Ratnajee Bhootajee[3], where the father of the appellants was sued with them for the debts incurred by him for the purpose of carrying on trade in hardware. The appellants' counsel relied on the text of Gautama, and contended that they were not liable for their father's commercial debts. However, the High Court rejected this contention and held that the sons were liable for the debts.

In the course of his judgement, Coutts Trotter, C.J., referred to the Privy Council's interpretation of the term avyāvahārika, and observed,

> "that the particular instances given in the Smritis must be treated as a mere expression of opinion on the part of the authors as to what classes of debts would fall under the general words. A modern Court would therefore be free in interpreting the general term to consider the particular instances given as obsolete under the conditions of today. I am clearly of opinion that commercial debts fall into this category and that we ought to say that

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1. Gaut., XII, 41 for the fuller discussion, see above p.70-74.
2. Ramakrishna v.Narayan, (1915) I.L.R. 4o Bom. 126. In this case, the sons were held liable for their father's debts incurred in a trade in fish, undertaken by him in contravention of Government Servant's Cunduct Rules, 1904. The Court was of the opinion that the alleged contravention did not constitute the debts avyāvahārika.
   Also, in Dasappa v. M.Nunjundia (1893) a loan taken by the father for certain contract works was held to be binding on the sons, as it was not proved to be for immoral or illegal purposes; (1893) 16 Mys. L.R. 1o3.
3. (1925) I.L.R. 49 Mad. 211.

the pious obligation extends to them."[1]

This observation clearly shows how the Courts tended to treat the listed debts under the general term, i.e., avyāvahārika or 'illegal or immoral'. Although the conclusion reached here would seem to be correct, the manner in which the Court arrived at this conclusion would seem to be not convincing. For the Court did not go into what was really meant by the term vaṇik-śulka, which was the basis of the appellants' contention. Had the Court inquired, it would have found, as we have shown above (see p. 272, ff), that the term could have hardly meant commercial debts; and the question of considering the liability under the doctrine of avyāvahārika debts would not have arisen.

In the case of Rajagopal Pillai v. Veeraperumal Pillai[2] (1927) the father had incurred debts in the course of carrying on a business in timber. To repay these debts the father raised money by alienations of ancestral property. In the suit by his son for partition, it was contended that the family was not a trading family, and that if the debts were incurred in a trade which was commenced by the father, the son was not liable for them, because they were avyāvahārika debts. For this position, the text of Gautama was relied upon. But after discussing what is meant by the term avyāvahārika, and following the above case, it was held that the debts were not avyāvahārika; and therefore the son was liable for them. The Court said,

> "It is impossible to believe that even in remote antiquity commercial debts were regarded as immoral

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1. Ibid., at p.213. His views on the subject appear, also, at J.D.Mayne, The Treatise on Hindu Law and Usage, 9th edn., (Mad., 1922), p.404. However, the discussion hardly throws any light on the subject. He cited no authority in support of his observation there. Moreover, the analogy on which he seems to have based his observation would seem to be defective; for the Privy Council's rendering of the term avyāvahārika was itself, as shown above, inaccurate. It is 'an unenlightened discussion', per J.D.M.Derrett, 'Indica Pietas', cit.above, at p.49, f.n.32.
2. (1927) 53 M.L.J., 232.

> debts. Trade is enjoined as a duty in the case of one of the three higher castes and it is incompatible with that notion to regard commerce as degrading. The very fact that, out of so many texts, the solitary text of Gautama alone can be cited in support of this theory shows that the rule enunciated by him did not correctly reflect the prevalent opinion even of his day."[1]

One would not disagree with the findings of the Court, but its implied acceptance, without any proper enquiry, of the construction placed upon the term vaṇik-śulka as meaning 'commercial debts' would hardly seem satisfactory, for whether Gautama's language amounts to commercial debts or merchant's toll is not clear. So, did Gautama in fact mean 'commercial debts' by vaṇik-śulka?

We know that all the other śāstrakāras have used the term śulka in this context, meaning certain 'tolls' or 'bride-price'.[2] However, Gautama has qualified the term śulka by the use of the word vaṇik, which taken together in this context would seem to mean 'trader's toll',[3] i.e., a toll due to trade or commerce; and to that extent he would appear to be more precise than other śāstrakāras. In view of this, therefore, it would seem erroneous to construe, in the first place, the term as 'commercial debts' in the sense of a liability incurred for starting or carrying on a trade or commerce. Supposing, however, for the sake of argument that it meant 'commercial debts' incurred for starting or carrying on a business; still, it would be very difficult to believe, particularly if he himself has clearly enjoined[4] trade as

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1. Per Mr. Justice Venkatasubba Rao; ibid., at pp.239-40.
2. For cases on this please see above pp.287-294.
3. Jagannātha takes vaṇik-śulka as a single expression meaning commercial tolls or duties payable at wharfs and the like; - vide, H.T.Colectrooke, trans., Digest, I., cit.above, pp. 306-307; also see above p.74.
4. Gaut. X.49, "The additional (occupations) of a Vaiśya are, agriculture, trade, tending cattle, and lending money at interest." - Vide G.Bühler, trans., S.B.E.2, (Oxford, 1879), at p.229.

a duty in the case of one of the three higher castes, that a great thinker like Gautama would include all kinds of trading liabilities under this category, irrespective of their nature. If at all he meant 'commercial debts' by the term vanik-śulka, then the trade or commerce contemplated by him might have been such as the one[1] which the śāstras would not have approved of at the time of his writing. In the absence of any direct evidence to the contrary, it would appear, therefore, that a normal commercial debt would not fall under the excepted category as the modern Courts[2] have said. It is for this reason that we would not disagree with the findings of the Court;[3] and yet, in our opinion, had the Court examined the text of Gautama in this manner, the question of considering it as obsolete would not have arisen.

However, since the decisions in the two cases discussed

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1. See, an observation that
   "when Gautama says that a father's commercial debts need not be repaid by the son, he is certainly not referring to the debts incurred in the usual course of carrying on a business or trade but evidently to sums borrowed for speculative and hazardous ventures, involving something like gambling;"
   would seem to make some sense. See J.D.Mayne, cit.above, (11th edn.), at p.399.

2. "The debt incurred by the father in respect of trade transactions cannot be said to be illegal or immoral or avyāvahārika." per Parker, J., at p.379, see, Annabhat v.Shivappa, (1928) I.L.R. 52 Bom. 376. In this case, the father's debt due to trade started by him was challenged by his son on the ground that it was not an ancestral family trade. The son failed because the Court held that the debt was not avyāvahārika. *

3. Rajagopal's case was followed in Venkatasami Naiker v. Palaniappa Chettiar, (1929) I.L.R. 52 Mad. 227, wherein the father, with the consent of his adult sons, had mortgaged joint family property for trade started by him. It was challenged by his minor son on the ground that the father had no power to do so, and that the trade was speculative. The son failed.

* see also Parmanand Jain v. Firm Babulal, A.I.R. 1976 M.P.187, which affirms this view (see below p.317,n.5).

above, the stand taken[1] by the sons to challenge the validity of their father's commercial debts would seem to have varied, as will be seen presently, due to their efforts to fix such debts of the father with some 'taint' which, they might have considered, would help them to prove that they were avyāvahārika. To get themselves exempted from the payment of these debts, therefore they began to rely, it seems, more on more reasonable considerations such as the father's imprudence, recklessness, or risky or speculative nature of the trade concerned than the trade as such.

Thus, in the following cases, the father's commercial debts were alleged to be avyāvahārika either because the trade concerned was different from the usual family business, or because it was completely new in the sense that before the father started it, the family avocation was not trade but something else.

In Narainrao v. Hanumantram[2] (1930) the father's debts to meet losses incurred in the lac-trade were attacked on the ground that the trade was not ancestral, and that it was of wagering or speculative nature and hence avyāvahārika. But

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1. Here, it should be noted that in a number of cases such as, for example, Nataraja v. Lakshman, A.I.R. 1937 Mad. 195; Budhkaran v. Thakur Prasad, (1941-42) 46 C.W.N. 425; Syed v. Nem Chand, A.I.R. 1945 Lahore 169, (F.B.); Lila Dhar v. Chunni, A.I.R.1951 All. 574; Kulitalai Bank v. Nagamanickam, A.I.R. 1955 Mad. 670; Kumbakonam Bank v. P.S.Pillai, A.I.R. 1956 Mad. 306; Shivramsa v.Gurunathsa, (1956), 58 Bom. L.R.239; Hindustan Ideal v. Perla Satteyya Chetty, A.I.R. 1961 A.P.183; etc. to name a few, the father's debts were for commercial ventures, but because the sons challenged those debts on the ground that they were not incurred for any legal necessity or benefit of the family, the doctrine of avyāvahārika was not invoked directly, and therefore, no useful purpose would be served by discussing those cases here. They have dealt mainly with the father's power of alienation, and any reference to the doctrine of avyāvahārika, as found in the case of Hindustan Ideal (see p.189, c.1), for example, was made in passing.
   In all these cases, debts incurred by the father were either for starting a new business or for extention of an existing one. Sons were held liable in all but cases of highly speculative or hazardous ventures.

2. A.I.R. 1930 Nag. 273.

the Court found that the transaction was not a solitary speculative venture. It was effected in the hope of improving the family finances. In view of this, the Court observed that

> "while it cannot be considered prudent for the manager of a family to indulge in risky transactions, there is no authority for holding that an act is avyāvahārika merely because it involves risk to the family estate."[1]

One wonders, however, whether the father's motive, however good it might be, would justify destruction of the joint family property: yet it seems that was not the real question.

In Bal Rajaram v. Maneklal Mansukhbhai[2] (1931) the debts incurred by the father in the course of his business were alleged to be avyāvahārika, because the business was allegedly run on an unlimited scale in a foolish manner without proper circumspection. In the considered opinion of the Court, having regard to the facts of the case, the father's alleged reckless or imprudent management of his business was not enough to make the debts avyāvahārika. The contracts concerned were not gambling or wagering transactions, and therefore the Court said, "There is no element of moral turpitude involved in these transactions."[3] This was a well argued and thoroughly discussed case. The son was held liable.

In the cases of Ramasingh v. Jalamsingh[4] (1939), Venkateswara Rao v. Ammayya[5] (1939), Sreeramaraju v. Pullam[6]

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1. Ibid., at p.277 c.1.
2. (1931) I.L.R. 56 Bom. 36.
3. Per Parker, J., ibid., at p.54, also see Tyabji, J., at p.60. This case was referred with approval in Jagadishprasad Ramlal v.D.B. Ambashankar, A.I.R. 1934 Bom. 324, at p.327; which in turn was followed in Gulamkhaja v. Shivlal Hiralal, A.I.R. 1938 Bom. 295, at p.296, c.2. The debts challenged in these cases were for starting a new business by the father The sons were held liable.
4. A.I.R. 1939 Nag.192.
5. (1939) 1 M.L.J. 493. This and above case were followed in Parmanand Jain v. Firm Babulal, A.I.R. 1976 M.P.187, at p.194, c.1. The facts of the case were similar.
6. A.I.R. 1963 A.P.4o3.

(1963) Rajan v. Kannikonda[1] (1975) the facts were similar in that the father's debts were due to trade started by him when trade was not the family's normal occupation. None of the trades involved was speculative. The sons were held liable in all these cases. It may be deduced from these decisions that starting a new business by itself cannot generally be held avyāvahārika;[2] for it is not repugnant to good morals.[3] It would appear that the contentions on behalf of the sons in these cases seem to represent a pervasive idea that the degree of risk involved in the change of the family's usual avocation by itself is so serious as to make the father's action avyāvahārika. However, the Courts have rejected the idea. Does this mean that a Hindu father is free to start any business and bind his sons for the debts arising out of such business?

In the latest case of Sridharan v. Murthi Brothers (1976)[4] the father who, though an agriculturist, was also doing business in Cotton, incurred debts in the course of his business and was sued by his creditors. On behalf of his minor sons, it was contended that the business was started by the father and was avyāvahārika. While rejecting this contention, in view of the facts of this case, the High Court observed,

> "In a joint family which is a non-trading family, it is left to the option of the father-manager ... to formulate schemes of expansion in the matter of acquisition of property by lawful means and if,

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1. (1975) 1 M.L.J. 26.
2. See (1939) 1 M.L.J. 493, at p.498,
   "It is too much at this time of the day to ask the Court to hold that all debts borrowed for purposes of trade by a Hindu father are avyāvahārika debt."
   Also see, "Starting a new business like the bus in this case cannot be called avyāvahārika. Vide (1975) 1 M.L.J. 26, at p.27, c.2.
3. The father's debt due to new business (a motor to ply for hire) was held not being repugnant to good morals was not avyāvahārika. A.I.R. 1939 Nag. 192, at p.193, c.1; i.e., (Ramsingh v. Jalamsingh).
4. (1976) 1 M.L.J. 100. Also see Gollamudi v. Indian Overseas Bank, A.I.R. 1978 A.P. 37, which is similar.

> in the course of such wishful thinking, the father-manager departs from the usual avocation of the family and starts a new business as an entrepreneur, that by itself cannot be characterised as an activity of the father which is not contemplated in the personal law or against it. If such a business conducted by the father-manager is ex facie a speculative one or one which no reasonable or prudent person would characterise as a business undertaken by the father-manager in the interest of the other members of the family, then things might be different. But, on the only ground that the new business has been started by the father-manager, as a commercial activity thought of by him and for the purpose of prudentially conducting it for the benefit and welfare of his children and other coparceners of the family, that by itself would not raise any presumption, much less a reasonable presumption, that the debts contracted in the course of the working of such a commercial activity are by themselves avyāvahārika debts ... The term vyavahāra means 'in the normal course'. The opposite of vyavahāra therefore should give an impression to a normal person that an abnormal activity was thought of by the father-manager or indulged in by him. For example, if an agricultural family, like the one under consideration, suddenly thinks of starting a gaming house with the intention of making profits thereon, though licensed under the provisions of the appropriate legislation, yet the very impression gained by a third party who is apprised of such an activity on the part of the father-manager, would be revolting, in the sense that he would adjudge such an activity as an avyāvahārika activity or as abnormal activity."[1]

It might be correct to say that for the first time the Court has attempted to explain the whole circumstance in the context of which one should examine the nature of a new business started by a Hindu father; and also has pointed out how one might adjudge whether or not a particular new business is avyāvahārika in view of Hindu law. If one goes by the example given by the Court, it would appear that a mere change from the usual avocation to a new business by itself would not be sufficient to constitute such a new business abnormal or avyāvahārika. To be so, besides being new, it has to be tainted, or so it seems, by moral turpitude as understood by the modern Hindu law. Running a gaming house would not necessarily amount to

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1. Ibid., at p.102 (para 8), c.1 and 2.

actual gambling by the owner, but the business itself, being associated with gambling could hardly avoid the stigma; for Hindu law would not be expected to encourage gambling which, undoubtedly, is avyāvahārika under Hindu law.

This brings us to the cases concerning trades involving speculative transactions. Apart from the grounds relied on by the sons in the above-discussed cases, this was one of the common grounds which was put forward to save the son's interest from the father's commercial debts.

Thus in Khemchand v. Narain Das[1] (1925) the original cause of the father's indebtedness was said to be 'satta bazi' i.e., transactions of speculative character; and on that ground the son contended that he was not liable because the debts were avyāvahārika. Whether the allegations were proved or not is not clear, but referring to the allegation the Court said that "Speculative transactions cannot be said to be immoral, and there is no denying the fact that these were made in the ordinary course of the business of the firm ... by his father."[2] Following this case, in Mauluk Chand v. Dayakishan[3] (1927), where the father's debts were due to Badni transactions the Court said, "Even if this were the case, the sons would still be liable, for the father could occur debts for the business in speculative transactions as they

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1. (1925) I.L.R. 6 Lahore 493.
2. Ibid., at p.498, cf. Ram Chandra Singh v.Jang Bahadur Singh. (1926) I.L.R. 5 Pat. 198, wherein debts incurred by the father for speculative transactions, i.e., for prosecuting litigations involving doubtful rights, were held to be not binding on the sons. The case was contested, however, on the ground of 'benefit of the family'. Also, the case of Nand Kishore v. Kunj Behari Lal, A.I.R. 1933 All. 303, is to the same effect. Therein the father's liability due to speculative litigation was held to be not binding on the sons (see p. 305).
   In Thanesher Pershad v. Ram Chand, A.I.R. 1929 Lahore 468, the father borrowed money to buy a commodity with the intention of selling it later when its price was higher. He was a Government servant and not a trader. The Court held in favour of the son saying that a mere random act of speculation cannot be treated as a ligitimate business necessity.
3. (1927) 106 I.C. 183.

cannot be said to be immoral."[1] Apparently, these two decisions have made it clear that undertaking speculative trade is not immoral, and debts incurred in the course of such a business are, therefore, not immoral. In the case of Chotkao Singh v. Hasan Bagar[2] (1929), although alleged, it was not proved that the debts of the father were for intoxicating drugs. But as regards the contention of speculative transactions, the Court observed, "Speculation is not usually repugnant to good morals. It may be foolish but it is not, unless tainted with fraud, immoral."[3] The more decisions we read, the further we seem to go from the spirit of basic Hindu law. The judges would seem to distinguish between speculative transactions and gambling properly so-called.

In Gulabchand Jethabhai v. Vadilal Sarabhai[4] (1950) the sons of the debtor had sued for a declaration that their interests in the joint family property were not liable for attachment and sale in the execution proceeding against their father which was caused due to his losses in speculative dealings in shares on the Stock Exchange. They contended that the debt was immoral in point of Hindu law and therefore they were not liable. In the opinion of the Court, the suit was really instituted by the father in the name of his sons. While giving the judgement against the sons, the Court said,

> "On Stock Exchange, actual deliveries and payments are made once a fortnight or so. On all intermediate transactions only differences have to be paid. Simply because the father's buying and selling might have been intermediate transactions, they

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1. Ibid., at p. 184, C.1. This case was followed in Pirthi Singh v. Mam Chand, (1935) I.L.R. 16 Lahore 1077. Here the liability of the father was comprised of losses in Badani transactions and balance of Agent's commission. The Court considered the debts as normal commercial liability and the sons were held liable. (see pp.1079-80 of the report).
2. A.I.R. 1929 Oudh 458.
3. Ibid., c.2
4. A.I.R. 1950 Kutch 78.

> did not become immoral or against public policy. Such transactions are recognised as legitimate means of earning. The only thing that matters in these transactions is whether an actual particular set of shares was there to deal in. In this case, there was such a set of shares. I hold that the plaintiffs' father's debt was not immoral and that it was perfectly legal."[1]

Not a single authority is cited in this whole judgement. However, the judgement would appear to have merit in that it has attempted to clarify the distinction which seems to exist between these speculative transactions and gambling or wagering contracts. Whether this minute difference, though material, between the two would make them vyāvahārika is another matter.

This brings us to a rather curious decision: curious because in it, it was not the nature[2] of the debt impugned but something else that was considered material to decide whether the sons of the debtor were liable. The case is Doshi Jayantilal v. Luhar Amritlal[3] (1954). In this case the father had incurred debts due to losses in satta in bullion, and to meet these losses he had mortgaged joint family property. The sons had challenged the execution of a decree obtained by the mortgagee of their father, on the ground that the debts for which the alienation took place were avyāvahārika. According to the Court, the father was evidently in collusion with the plaintiffs (sons) who supported their claim. In view of these facts, the case was decided against the sons on the ground of their failure to prove the alienee's knowledge of

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1. Ibid., at p. 79, c.2.
2. It should be noted that ever since the famous decision of the Privy Council in Hunoomanpersaud's case, (1856) 6 M.I.A. 393, it was the nature of the debt impugned which has been deciding factor in cases where the son's liability was concerned. See above p.262.
3. A.I.R. 1954 Saurashtra 36.

the immoral[1] nature of the original debt; for, in the Court's opinion, that was the material issue to be decided in this case. At present, we are not concerned with the propriety of this issue. Our present problem is speculative transactions, and while referring to the argument of the Appellant's Counsel, that such debts, though speculative, are not repugnant to good morals, the Court has remarked that, "A distinction must however be drawn between merely speculative debts and debts of the nature of gamble or wager which are illegal under the Indian Contract Act;"[2] but the Court left the issue there without any further elaboration. An opportunity to explain the issue properly presented itself soon, on appeal in Luhar Amritlal v. Doshi Jayantilal[3] (1960), but the Supreme Court, too, declined to do so in the light of the texts, saying, among other things, that

> "If we were to decide today what the true position under Hindu law texts is on the point with which we are concerned, it would be very difficult to reconcile the different texts[4] and to come to a definite conclusion."

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1. Relying on the findings of the Lower Courts, the High Court seems to have assumed that the debts were 'illegal or immoral'; see, "that the antecedent debt which have been proved in the present case were illegal or immoral", ibid., at p.38, c.1.
2. Ibid.. It may be said that cases involving Kuri or Chit funds started by the father, would seem to fall under similar category as the liability incurred by the father to subscribers of such funds was held to be not binding on the son; see, Muthusami Servai v.N.K.Mytheen, A.I.R. 1937 Mad.344, and S.M. Pillai v. Muthusami Servai, I.L.R. 1939 Mad. 70. In both these cases the father and sons were sued for recovery of subscriptions paid into such funds started by the father, but sons were held not liable. But the ground, upon which the decisions were based, had reference not to Hindu law but to Indian Penal Code. (see, 'Chit fund amounted to a lottery, and the promoters of the kuri ... committed offence under S.294-A, I.P.C.;') - per Full Bench in Sesha Ayyar v.Krishna Ayyar, A.I.R. 1936 Mad. 225 (F.B.), at p.229. In this case the claim was against the father only, who was held liable. It might be correct to state that these decisions would allow the sons to accumulate the so-called 'illegal' gains of the father without being liable.
3. A.I.R. 1960 S.C. 964.
4. Ibid., at p. 970, c.1.

Had the Supreme Court come to this conclusion after pursuing an enquiry it would have commanded greater respect. The fact that the Supreme Court avoided the issue hardly helps us in determing the nature of debts due to speculative transactions.

The suggestion that 'merely speculative debts' should be treated on a different footing from 'debts of the nature of gamble or wager' would seem to make some sense in that it attracts our attention to take into account certain existing facts of the business life of today as against those which might have been existed at the time when the smṛits were written.

So, assuming that no Stock Exchange existed when the smṛits were written, and therefore the śāstrakāras would not have included in the exception under consideration debts arising out of dealings such as in share market; how could one go about reconciling the present situation with the śāstric precepts of Hindu law? Obviously, one would as the Courts seem to have tried to do, apply a principle which would be suitable, as the next best thing, for meeting the needs of the day. 'Speculation' being the common feature, attempts were made, in the cases discussed above, to persuade the Courts to consider these debts in accordance with the provision concerning 'gambling' debts. Seen in the light of the above discussion, therefore, it is quite clear that the Courts have held debts due to gambling as avyāvahārika; but so far as the debts for speculative transactions are concerned, they have expressed difference of opinion on the ground that, for example, in speculative transactions such as dealing in shares, there is always an actual particular set of shares to deal in, and their delivery can in fact be effected. Admittedly, this is not exactly the same thing as betting on horses; but would it make any difference, if the father entered, as was the case in Gulabehand Jethabhai (see above p.321), into such transaction merely to collect profits or to pay losses without ever intending to take delivery of the

shares? It appears that the mere existence of a set of shares would hardly affect the nature of the debt, if the intention of the dealer (father) was nothing but pure speculation as in horse-racing. Thus, while determining the liability of the son of such a dealer, it would appear that the intention of the dealer rather than the existence of an actual set of shares - or for that matter even gold bullion, should be regarded in the context of the facts of each case.

Not only the debts for a new or a speculative business, but also usual Government taxes, such as income tax, in respect of profits made in such businesses were challenged on the ground of avyāvahārika. Thus, in K.Devadattam v. Union of India[1] (1958), the sons of the assessee had contended that they were not liable for payment of income tax assessed upon the estimate made by the Income-tax Officer, as the debts were avyāvahārika having been incurred by their father in a trade which was speculative in nature. Rejecting the contention the High Court said,

> "There is absolutely no force in the argument that the father contracted debts for the business which was of a speculative nature and therefore the debts were tainted with immorality and illegality for which reason the liability of the sons by reason of the theory of pious obligation is excluded. It is in respect of the huge profits made by the father that the income-tax was imposed and so the family being in enjoyment of these properties is liable to bear the burden of the tax and they cannot escape payment of tax by taking refuse under untenable pleas."[2]

However, in M.R. Radhakrishnan v. Union of India[3] (1959) the plea was based on the concealment of true income by the father. The facts proved in this case were that income-tax was assessed, due to concealment of true income, on the basis of estimation. The sons raised a very different plea, contending that a tax levied on such basis would be in the

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1. A.I.R. 1958 A.P. 131.
2. Ibid., at p. 138, c.2.
3. A.I.R. 1959 Mad. 71.

nature of an avyāvahārika debt because the conduct of the father in suppressing the accounts was repugnant to good morals. The assessment was not in any sense a penalty or fine imposed on the father for non-production of accounts or for suppression of material information; nor was it in excess of what would have been a proper assessment.

In the opinion of the Court, unless an element of moral turpitude is involved in the debt it could not be called avyāvahārika.[1] While holding the sons liable, the Court said that the father

> "has not voluntarily incurred any debt. On the income earned a tax has been imposed. One method of imposition is by levying the tax on an estimated income. The matter would of course have been different if a fine had been imposed on the second defendant for concealment of income and that fine is sought to be recovered from the shares of the sons as well. But this is not the case here. We agree with the learned Judge that by no stretch of imagination can the liability to pay the tax[2] be brought under the category of avyāvahārika debt."

But it was argued that the sons might escape the liability of such debts under another exception, i.e., śulka, which has been translated sometimes as 'tax' and sometimes as 'toll'. In this connection, after expressing doubt as to the exact meaning of the term śulka, the Court stated,

> "A son should be relieved of the obligation to pay a toll which his father has become liable to pay. Problably this is because a toll is payable on the spot and as the obligation arises as the result of an evasion for which he may be convicted and fined, it was an obligation ex delicto. It may be the conduct of a father[3] in evading payment of a toll was not good conduct."

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1. Ibid., at p.73, c.2.
2. per P.V. Rajamannar, C.J., Ibid., c.2. The decision in Chaganti Raghava Reddy v. State of Andhra, A.I.R. 1959 A.P.631, would seem to agree with this view by implication. The case was between one of the creditors (a decree-holder) of the assessee (the father-debtor) and the Tax Authorities claiming priority in regard to the share of the sons in the joint family property, for the purpose of settlement of their claims against the father.
3. Ibid.

This might have been the case in those days; but could we say that the conduct of evading income-tax by concealment of accounts or real income is good even today? Perhaps not; but the debt could not be tainted, being levied under a statute. However, in the absence of any authority for the position that the word śulka would apply to arrears of income-tax, the Court held that the sons were liable for the debt because it was not avyāvahārika.

Although the question referred to the Full Bench in J. Devaraja Rao v. Income-Tax Officer[1] (1970) concerned the sons' liability for the arrears of income-tax, due by the father in respect of a separate business prior to a partition between him and his sons, they have examined very carefully the nature and the scope of the liability arising out of the father's unpaid income-tax. According to them it was certainly not avyāvahārika in this case.[2]

As regards the various constructions placed upon the terms used in the texts on the subject under consideration, i.e., the words avyāvahārika and śulka; the Court observed that,

> "it is for the Court to decide in the context of the present society whether any particular tax liability is of such a nature as could be treated as one tainted with illegality or immorality or opposed to right conduct as to bring it within the exception to the general rule that the son is liable to pay the father's debt. We have no hesitation in holding that the liability to pay arrears of income-tax cannot be regarded as one such."[3]

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1. A.I.R. 1970 A.P. 426, (F.B.).
2. "There can be no doubt that the liability in the present case ... cannot be said to be avyāvahārika." - Ibid.,at p.429.
3. Ibid., c.2. Further,
   "It has been repeatedly held that the son is liable to pay the debts of the father incurred during the course of trade which he had lawfully carried on. It does not stand to reason that while the son is liable to pay the debts of the father so incurred, he is not liable to pay the tax due in respect of the profits of that trade, or debts incurred by the father for the purpose of the payment of those taxes."
   See, ibid.

Moreover, having regard to comments made by various writers and Courts as to the meaning and scope of the term śulka the Full Bench said,

> "We are of the opinion that having regard to the context in which it occurs, śulka must be confined only to such liability, though in nature of tax or a duty, which would involve some moral turpitude on the part of the father or the incurring of which would be tainted with illegality or immorality."[1]

Thus, it would appear that unless some moral turpitude is involved, all taxes due from the father would have to be paid by the sons.

The facts in State of Rajasthan v. Mohan Lal[2] (1971) are not at all clear. It seems that the father of the respondent was accused of selling opium, without maintaining proper accounts; and consequently was held liable to pay a certain amount as Chori Mehsul. Besides, he was also fined Rs. 500 which was recovered from him. At another place in the report,[3] it is stated that the Chori Mehsul was imposed on him because he was found to have 'exported opium illegally'.

The High Court held that the liability was due to a cause repugnant to good morals and therefore the son was not liable. Apparently the Court would seem to have considered the impugned levy as in the nature of a punitive assessment for illegally exporting opium. But, if it were so, why should he have been made to pay a fine of Rs. 500 in addition to the punitive levy? We find no clear answer to this question from the facts reported. It may be that the father of the respondent might have been found guilty on two counts: firstly, on account of trading in contravention of export rules; and secondly, for concealment of truth by way of not maintaining proper accounts. If the sole basis of the impugned levy was these acts of the father, then it would seem to have been tainted with illegality and immorality. The description of

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Ibid., at p.430, c.1.
2. A.I.R. 1971 Raj. 318.
3. Ibid., at p.319, c.2

the levy that it was Chori Mehsul would also seem to suggest that the whole amount was assessed according to some special rules applicable to only those who had broken the law; for the term Chori Mehsul would, in this context, mean a levy imposed for trading in secret, i.e., in contravention of the law concerned. Looked at from this point of view, the impugned amount, being a penalty, would seem to be tainted with illegality as well as moral turpitude, so far as the son's liability is concerned; and therefore, he would not be liable. It would come under danda. Although this result would manifestly defeat the purpose of the export regulations, and consequently the state's right to collect legal taxes due from its citizens or subjects, it need not be considered alarmingly serious; for the son's immunity is an exception, and not the general rule. Had the actual amount of excise duty and the penalty been specified clearly, the son would have been liable for the excise duty, though not for the penalty (see below cases on fines).

Thus, to sum up the discussion in respect of the father's commercial debts, it may be correct to say that:
(1) commercial debts as such were neither, it seems, avyāvahārika in ancient times, nor are they so now; that
(2) the debts incurred for a new business, even if the business was not the normal family avocation, would not be avyāvahārika unless they involved some moral turpitude; that
(3) the debts due to speculative transactions, too, have often been held to be binding on the son unless they amounted to gamble or wager; though the distinction drawn between pure gambling and a speculative transaction which would bind the son, would seem to be very thin. One wonders whether a Hindu father should be allowed to play with the ancestral property with such ease and in such manner, simply because the activity is considered to be a legal means of earning one's living. Even if the śāstras had no idea then of such commercial dealings as buying and selling shares in the modern

Stock-Exchanges, they would seem to be quite explicit as to what kind of risks a trader may reasonably undertake to justify the validity of his liability from the point of view of his son's pious obligation to pay it. It is in the light of such approach, and not merely from the point of view of the legality or presence or otherwise of actual shares to be bought and sold, that the nature of a Hindu father's debts of this type should, it seems, be judged. And that

(4) the debts or liability of the father due to taxes imposed on profits made would generally bind the son except when (as can rarely happen) they are tainted with moral turpitude on the part of the father. In short, unless the trade or commerce or any liability arising in connection with such trade or commerce undertaken by the father is in some way connected with immorality on the part of the father, the son would be liable.

(iii) Debts due to Fines.

In the course of the above discussion, we have noticed the judges making reference to fines or debts due to fines imposed upon the father as not binding on the son. It would appear from the following discussion that there is no difference of opinion between the Courts and the śāstric position of Hindu law on this subject. We have, however, a very few cases directly on the subject.

Thus, in Nhanee v. Hureeram Dhooluba[1] (1814) there is a reference to a case decided previously by the Bengal Sudder Dewanee Adawlat, in which on the advice of the Hindu law Officer the Court had held "that a son is not liable for a penalty incurred by his father in expiation of an offence; for neither sins, nor expiation of them, are hereditary."[2] In this case, the father who had imprisoned and fined a Brahmin widow, was himself charged and severely fined, but before its recovery he had died.

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1. (1814) 1 Bor. 95.
2. Ibid., at p. 101.

However, in the later case of Luchmun Koour v. Mudaree Lall[1] (1850), despite the son's objection, the Court upheld a sale of ancestral property on the ground of urgent necessity, i.e., to meet, among others, 'the fine of Rs. 100'[2] imposed upon the father. The decision would show that the śāstric position relied on in Nhanee's case was neither expressly relied on nor followed in this case. Perhaps, a prevalent practice[3] at the time in that part of the country, rather than the precepts of Hindu law, would seem to have influenced the decision.

In Ramaiengar v. The Secretary of State for India,[4] (1910) the liability to pay costs, in a false suit brought by the father in forma pauperis, was imposed on him. The Court held that the debt so incurred was tainted with immorality and that the sons were not bound to pay it. According to the Court, "The reason why the appellants' father was made liable for these costs was that he had been guilty of what was certainly an immoral act in bringing a suit which he must have known to be false."[5] The liability was treated in this case as in the nature of a fine.[6] It is the dishonesty of the

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1. (1850) S.D.A. (N.W.P.) 327.

2. Ibid., at p. 328. Here, while justifying the sale the Court said, "The circumstances did establish a case of urgent necessity sufficient to justify the sale, as it was shown that the decrees of creditors were in execution ..., and that Hurdeo Singh was himself in confinement ..., and had been fined Rs. 100."

3. See above p. 227.

4. (1910) 20 M.L.J. 89.

5. Ibid., at p.90.

6. "Again, under Hindu Law, among debts which sons are not bound to pay are fines, ... and in this case the liability imposed upon the appellants' father may also be regarded as in the nature of a fine." - Ibid., at pp.90-91.

   We have a similar decision in Mohammad Ali v.Jhao Lal, A.I.R. 1928 Oudh 10, at p.13, c.1-2; where the father's debts due for payment of costs incurred in suits brought by him on false and dishonest grounds. The sons were held not liable to pay the costs for which decrees were passed againgst the father. Cf. Paryag Sahu v.Kasi Sahu (1910) 14 C.W.N. 659, at p.661, c.2. In this case, it was contended that the father's debts due to costs would come under the scope of the word danda or fine; but

f.n. continued next page.

father, the basis of this liability, that saved the sons in this case; otherwise costs awarded by the Courts would normally, as will be seen presently, be birding on the son.

In Savumian v. Narayanan Chettiar[1] (1914) the sons had claimed exemption from liability to a mortgage debt contracted by their father to redeem jewels pledged to pay a fine imposed upon the father when convicted of a criminal offence. The mortgagee was found to have made no reasonable enquiry. The sons' contention was upheld because in the opinion of the Court it was not[2] a debt binding on the sons. Thus, here, once again, the śāstric rule was upheld.

In the case of Sunder Lal v. Raghunandan Prasad[3] (1923) the debts incurred by the father and the grandfather were for damages awarded against them for malicious prosecution. The sons contended that the debts were avyāvahārika and therefore they were not liable. While upholding the sons' contention, the Court said,

> "The prosecution was held to be false, and Teju and Goberdhan were liable for criminal prosecution as well as for civil damages, and the damages awarded in the Civil Court were like a fine imposed upon them in a criminal case ... The debt in question is undoubtedly not vyāvahārika. It would also come under the words daṇḍa śulkāvaśeṣam in Manu and Yājñavalkya."[4]

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f.n. continued from last page) the Court refused to accept the contention, and his sons were held liable. In this case, a decree for costs was passed against the father who had failed to substantiate a claim made to a certain property.

However, in Said Ahmad v.Raja Narain, A.I.R. 1932 Oudh 255, at p.263, c.1; though the costs incurred in defending the father in a criminal case were held to be binding on the son; money borrowed for the payment of fine imposed on the father in a criminal case was considered to be avyāvahārika.

1. A.I.R. 1914 Mad. 244.
2. Ibid., at p.245, c.2.
3. (1924) I.L.R. 3 Pat. 250.
4. Ibid., at p.253. It may be noted here that of the words daṇḍa śulkavaśeṣam quoted here, only daṇḍa and not the śulka, would apply.

The circumstances which led to incurring the liability were apparently illegal, immoral and against the public policy. But, whether such a liability should be considered to be in the nature of a fine as envisaged by the śāstras, is a different matter. One would be inclined to think that such a view would seem to be rather superfluous, because in legal terms how could it be a fine unless it was, in fact, imposed as such in a criminal case? Moreover, unless it is a fine properly so-called, application of the śāstric rule would seem to be improper. However, as the damages awarded against the father in this case were treated as a fine by the Court, the sons were absolved of their liability.

Also, we have seen in the case of State of Rajasthan v. Mohan Lal,[1] (1971) that the liability to pay Chori Mehsul by the father was considered to be repugnant to good morals. According to the Court it was of the nature of a fine or penalty. It was, therefore, held to be avyāvahārika, and the son was relieved of the liability.

Thus, as far as the father's liability due for a fine is concerned, there appears to be agreement between the śāstras and the modern Courts of law.[2]

(iv) Debts on account of Costs: This may be the appropriate place to examine whether debts of the father due to costs awarded by the Courts against him or his expenses in respect of litigation of any kind should be regarded as avyāvahārika. We have already noticed that such debts were

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1. A.I.R. 1971 Raj. 318; for the facts and fuller discussion of the case, see above p.328.
2. This is the position today. But, seen from the decisions in the cases of the Pawar Family (1677) (see above p.227, f.n.1) and Luchmun Koour v.Mudaree Lall (1850) (see above p.331) it would appear that in practice even the fines imposed on the father were recovered from the son. However, as the śāstric rule was not specifically invoked in these cases, one could not be sure as to whether the practice came into being due to ignorance of or disregard for the śāstras. Perhaps, monetary considerations prevailed above everything else.

held to be avyāvahārika in the cases of Ramaiengar v. The Secretary of State for India[1] (1910) and Mohammad Ali v. Jhao Lal[2] (1928) as the costs awarded were in the nature of a fine.

In Prayag Sahu v. Kasi Sahu[3], (1910) a decree for costs was passed against the father, since deceased, who had failed in substantiating his claim to a certain property. His sons contended that the liability was of the nature of a fine, so it was not vyāvahārika in terms of Hindu law, and therefore, they were not liable for the debt. They were held liable for it, however; because the claim of the father was not found to be false or dishonest, though it might have been imprudent or ill-advised.

While explaining the basic position at Hindu law on the subject, Chatterjee, J. said,

> "Words used by Hindu law-givers must be understood in the sense in which the authors may be supposed to have used them. Hindu Courts of justice did not allow costs to successful litigants but imposed upon the party who took a false plea a fine payable to the king, equal to the claim[4].... So that costs

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1. See above p. 331.
2. See above p. 331, f.n.6
3. (1910) 14 C.W.N.659. Note that the first name here is spelt as 'Paryag', but in 11 C.L.J.599 it is 'Prayag' which seems to be correct.
4. Ibid., at p.661, c.1. As regards this, reference may be made to the following:
   Ninhave bhāvito dadyāddhanam rājñe ca tatsamam /
   Mithyābhiyogī dviguṇam abhiyogāddhanam vahet // Yājñ.II.11
   vide N.Khiste and J.Hosinga, ed., cit.above, p.418.
   That is to say "If the defendant denies the claim of the plaintiff and the latter proves his claim by witnesses then the defendant will pay the plaintiff's claim and an equal penalty to the King." (see (1910) 14 C.W.N.659, at p.661,c.1).
   Also, to similar effect is Manu, VIII.59 according to which:
   Yoyāvannihnuvītārtham mithyāyāvativā vadet //
   Tau nṛpeṇ dhyatadharmajñyau dāpyau taddviguṇamdamam // 59//
   vide V.N.Mandlika, ed., Mānva-Dharma Śāstra, vol.2, cit.above, at p.910; which means "If one falsely denies a debt, or if the other falsely demands it, these two, proficient in dishonesty, should be made by the King to pay a fine double that sum."
   Manu, VIII.59, vide G.Jha, trans., Manusmṛti, vol.IV, pt.1, cit.above, p.80. - For the views of the other śāstrakāras, reference may be had to G.Jha, Manusmṛti, (Comparative) Notes, pt.III, (Cal.1929), pp.565-66; where views of Vyāsa, Yama,

f.n. continued next page.

> awarded against a defeated litigant could not be danda or fine within the meaning of the text. Interpreting the word vyāvahārika in the same way the costs could not come within the exception as the venerable Rishi could not have meant to exclude a thing which had no existence in his time."[1]

Seen in the light in which it is presented, one would be inclined to agree with this view because the nature of the costs awarded here would seem to differ from what the king used to impose upon a defeated dishonest party in those days. Nothing like the costs as understood in these days would seem to have been awarded to a successful litigant in ancient times, and the attempted analogy is not perfect. In the present case, moreover, the decree for costs was given in favour the successful party, not because the defeated party was dishonest but simply because, in the opinion of the Court, the successful party deserved to be compensated.

In Sumer Singh v. Liladhar[2] (1911) a debt incurred by the father to defend himself in a suit for defamation was, in the opinion of the Court, not immoral and hence binding on the sons.[3] Similarly, in Chuman Chaudhury v. Ram Sunder[4]

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f.n. continued from last page) Nārada, and Yājñavalkya are given, which would seem to be more or less similar. Even in the arthaśāstra there are provisions to similar effect see Kaut. II.33-48; vide R.P. Kangle, cit. above, p.II, pp. 264-65.

1. (1910) 14 C.W.N. 659, at p.661, c.1-2.
2. (1911) I.L.R. 33 All. 472.
3. Ibid., at p. 474. This case was followed in Ram Lal v. Jagdish, A.I.R. 1938 All. 591. In this case a decree for costs was awarded against the father, but before its execution he died. The son objected its execution on the ground of avyāvahārika, but the Court held that in defending the suit concerned the father's conduct was not opposed to good morals, and hence the debt was not avyāvahārika. The son was held liable.
4. (1917) 39 I.C. 861.

(1917) the father's liability, which arose out of costs for defending himself against a criminal charge upon which he was already convicted, was challenged by his son. However, in the course of its judgement, the Court observed that,

> "It is the pious duty of the son to pay such a debt, especially as in this case the offence charged was not one involving any moral turpitude. The father was convicted of an assault committed by him in asserting his right to a portion of the family property."[1]

Thus, the debt was held to be binding on the son.

In the light of this decision, one might consider that the son would be liable for such debts only where no moral turpitude was involved. It is of interest that the Court may find no moral turpitude (from a Hindu standpoint) even where the father was convicted under the Penal Code. There have been a number of cases,[2] however, in which the son was

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1. Ibid., at p.862, c.1.

2. Thus, in Beni Ram v. Man Singh (1912) I.L.R.34 All.4, at p.7. The debt incurred by the father for defending himself against a serious criminal charge was held to be binding on the son as it was found to be for a legal necessity. While explaining its view, and after expressing doubt as to the correctness of certain previous decisions in which alienations of ancestral property made in order to obtain release from jail of the father who had been shown to be guilty of a criminal offence, were held to be for family necessity, and therefore, valid; the Court said,
   > "There is, however, clear distinction between selling or mortgaging property in order to obtain the release from jail ... and selling or mortgaging property in order to raise funds for the defence of a member who has been accused in a criminal Court. In the one case the family has been disgraced and the release of the offender will not remove that disgrace. It is also desirable that an offender should suffer for his misdeeds. In the other case the family is threatened with disgrace, and the intention is to ward it off. According to our system of jurisprudence and practice a man is presumed to be innocent until his guilt is established. The question, whether in such a case as this legal necessity exists for raising money cannot depend upon the result of the trial." per Chamier, J., at p. 7.

   (Cf. Nathu Rai v. Dindayal Rai (1917) 39 I.C. 665, which appears to be a case of the manager of joint family. It was held there that unless other coparceners' consent is obtained, the manager could not validly alienate joint family property to defend himself against a criminal charge.)

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held liable for such debts on the ground of 'necessity'; but we are not concerned with them here because the doctrine of avyāvahārika was not invoked in these cases.

As far as the Courts are concerned, however, they would seem to be free to bring in this doctrine even when it was not invoked. Thus, in Maruthappan v. Niraikulathan[1] (1937) the grandfather had mortgaged ancestral property to raise money to pay an Advocate who was engaged to assist the police in prosecuting a man accused of having murdered his son, i.e., the father of the defendants 2 and 3. The mortgagee contended that the alienation was binding on the sons on the sole ground

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However, both the above cases and Sumer Singh v.Liladhar's case were followed in Ramalingam Pillai v.Muthayyan (1914) 26 M.L.J. 528; where a sale of ancestral property for the purpose of raising funds for the defence of the father in a criminal case was held to be for family necessity, and therefore, binding on the son. (see p.531 of the report).

Also, in Said Ahmad v. Raja Narain, A.I.R. 1932 Oudh 255, where the facts were similar to that of the above case, the Court held that the debts were for the family necessity and hence binding on the sons. (see p.262, c.2).

So is the decision in the case of Hanumat Mahton v. Sonadhari Singh (1919) 52 I.C. 734, at p.735, c.1. The debts incurred to defend the father in a criminal case were held to be binding on the sons on the ground of family necessity. In this case Mr. Justice Jwala Prasad's observation: "The stigma of criminal charge ... of the family" etc.; which would seem to be almost identical to that of Chamier, J., quoted above. One wonders, how many people in these days would consider such 'stigma' important enough to make such defence a family necessity. However, no one would doubt that the defence of the father or any family member by itself is a family necessity, irrespective of such a consideration as 'stigma'.

1. I.L.R. 1937 Mad. 943.

of 'necessity'. In the opinion of the Court the debts were neither for 'necessity' nor for 'family benefit'. In spite of this finding, however, the Court held the sons liable on the ground that the debts were "neither illegal or immoral."[1] Anyway, this was a case in which the costs had nothing to do with defending any member of the family, nor protecting the family's interest in the material sense. The whole exercise would seem to have been undertaken either to satisfy feelings of revenge or prestige or, perhaps, for the vindication of justice. It could be argued that it was the duty of the State to find out and bring to book the real offender, and to that extent the expenses were not necessary. But having regard to the personal love and affection involved in the father-son relationship, it would appear that the debt involved in this case could hardly be described as avyāvahārika; for, it was in no sense tainted with moral turpitude, nor was it a sheer waste in the normal sense, because though 'necessity' or 'family benefit' might not be manifest in the conventional sense of those terms, in the circumstance of the case, both these factors would, in a peculiar sense, seem to be present. Achieving a sense of satisfaction may well be construed in this sort of case as necessary as well as beneficial. This is the unique case on this subject. The Court had no help from any previous decision; there seems to be none directly on the point. However, the decision would seem to be correct in that it would seem to fit into the spirit of Hindu law.

In Lakshminarasimhamurti v. Venkata Jogisomayajulu[2] (1939) the father was ordered to pay personally costs which he had incurred while defending a suit on behalf on his minor daughter by setting up a false will. It was for that reason that the Court ordered him personally to pay the costs of the plaintiff although he himself was not a party to the suit. The Court held[3] the debt avyāvahārika, as it was tainted with illegality and immorality, and hence his sons were held not

1. Ibid, at p. 947.
2. (1939) 2 M.L.J. 499.
3. Ibid., at p.500-501.

to be liable for it.

The son in the case of Ananga Bhusan v. Uchhab Sahu[1] (1955) challenged the debt incurred by his father for defending himself in a criminal litigation on the ground of avyāvahārika. The contention was overruled for want of any direct authority; and after discussing the cases of Beni Ram, Hanumat Mahton, etc.; (see f.n. 2 at pp.336-337); the Court came to the conclusion that the said debt was not avyāvahārika[2] and therefore it was binding on the son. Although one would not disagree with the finding of the Court, it may be pointed out that the cases relied on for this decision have hardly said a word as regards avyāvahārika debts.

Apart from cases in which the father's liability in respect of costs arose in connection with criminal litigation, there have been a number of cases in which the sons have contended that the costs impugned were illegal or immoral because of the father's wrongful conduct in the litigations concerned or in incurring the original liability.

In Musst. Nanomi Babuasin v. Modun Mohun[3] (1885) where the father's debts consisted of a loan, mesne profits, interest and costs, and consequently the joint family property was sold, it was contended on behalf of the son that the debts were tainted becasue of the father's wrongful acts in incurring them. It did not impress the Privy Council. They thought that the High Court was right in holding that the whole debt must be taken as a family debt; and a sale to answer it effected by the father or in a suit against him could not be successfully impeached.[4]

Although the costs involved in this case were not the significant portion of the total debts, nor the sole basis of the decision, and despite the fact that hardly anything was said as regards costs in the decision, this case was relied

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1. A.I.R. 1955 Orissa 179.
2. Ibid., at p.184, c.1.
3. (1885) 13 I.A. 1.
4. Ibid., at p.19.

on and followed in Shambu Bhan Singh v. Chandra Shekkar[1] (1925). In this case, it was contended by the son that the debts incurred by his late father for contesting a decree for mesne profits were illegal or immoral. However, as regards the expenses incurred by the father for prosecuting the suit, the Court observed that the father

> "was defending his position to the estate of his father. No objection can be taken to that act of his and if he eventually failed in the litigation against his sister on questions of fact on which the Court of first instance and the Court of Appeal had differed, it is hardly possible to characterise his conduct as immoral or illegal."[2]

The son was, therefore, held liable.

In Darbeshwari Singh v. Raghunath[3] (1949) the facts proved[4] were as alleged by the son, the costs awarded against the father incurred due to his fraudulent and collusive transactions. After discussing various authorities both for and against (see pp.518-519 of the report), the Court said that

> "the costs incurred by Sarjung in the present case in prosecuting the previous suit was avyāvahārika debt, for which the son is not liable, and his share cannot be sold for payment of the decretal amount."[5]

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1. A.I.R. 1925 Oudh 230.
2. Ibid., at p.231, c.2. Cf. Nand Kishore v. Kunj Behari, A.I.R. 1933 All. 303, at p.305, c.2.
   In this case the costs impugned were incurred for the purpose of delaying execution of certain decrees for mesne profits against the father. An agreement made in pursuance of such purposes was held to be against public policy. According to the Court, 'the transaction was clearly speculative and therefore the father was not entitled to employ joint family property liable for such action of the father.' In this case, the question has been tackled from the point of view of the father's power of alienation of the joint family property.
3. A.I.R. 1949 Pat. 515.
4. "In my opinion ... the claim ... was fraudulent and dishonest." per Ramaswami, J., ibid., at p.518, c.1.
5. Ibid., at p.519, c.1.

Thus, the father's original claim, which was proved to be deliberately fraudulent, seems to have tainted the nature of the liability, i.e., costs. The son was absolved of his liability, but the father was held liable to pay the costs from his share of the property.

However, the same High Court in Kirit Singh v.Chandrakali Kuar[1] (1951) came to a different conclusion. There the sons had alleged that the costs awarded against their father were not binding on them, because their father was guilty of a fraudulent act and therefore the debt was of the nature of avyāvahārika debt. As to the question of fact, the sons had failed to prove their father's fraudulent conduct. Both the Courts below rejected the allegation and the sons were held liable; hence this appeal

The High Court observed[2] that

> "The obligation of the son to discharge his father's debt depends upon the nature or character of the debt when it originated - an examination of the circumstances before or after the liability is incurred is irrelevant to ascertain the nature or character of the debt. If there is something illegal or immoral in the act of the father when the liability is incurred, the son is not bound to discharge it. If, however, the father incurs a debt (voluntary or involuntary) to make good a loss caused by his wrongful act, such a debt cannot be said to be illegal or immoral, and the son cannot claim exemption merely because the act in consequence of which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral. Suppose, for instance, a father steals a property, but later on repents, and being unable to restore the stolen property makes good the loss by incurring a debt. Such a debt cannot be said to be immoral or illegal in its origin because the purpose of the debt is highly moral. A son cannot be absolved from liability to pay such debt simply because the father was guilty of an immoral act when he committed the theft." .....

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1. A.I.R. 1951 Pat. 587.
2. Ibid., at p.590, c.1.

and went on to say that

> "We have to examine the nature or character of the debt in the case before us at the time when the liability was first incurred by Raghunandan. The obligation, it may be observed, was unwillingly incurred by him under a lawful compulsion. S.35, Civil P.C. gives a discretion to the Court to award costs and the Court has power to determine by whom or out of what property and to what extent such costs are to be paid. If by virtue of such power the Court awarded costs to the respondents in the exercise of its discretion the origin of the liability so created cannot be said to be tainted with any illegality or immorality. Even if Raghunandan was guilty of a fraudulent act in filing a hukumnama which was not genuine, his conduct before the date of the decree cannot be taken into consideration. The decree for costs, in my view, cannot be said to be Avyāvahārika."[1]

It may be noted at the outset that the example of 'theft' cited above by the Court would hardly seem to apply to the liability incurred by the father in this case. Moreover, despite the Court's opinion that it is by the examination of the nature of the father's act in its inception that the nature of the debt should be determined, it has in fact examined the time not of the father's act but of its own act, that is the decree for costs, for the purpose of determining the nature of the debt. In other words, it is not the time of the father's conduct in instituting the suit, but the end of that conduct which has been taken into account. One hesitates. But for the father's conduct how would the Court have given the decree for costs? It was not a question of deciding whether a debt created by a decree of the Court was immoral or illegal; but it was to determine whether the father's conduct which led to the Court's decision was tainted.

Seen in the light of our discussion on the subject so far, it may be said that it is the father's act, and not the Court's award, that would seem to matter in determination of the son's liability. For this reason, the Court's assertion (at p. 592) that 'even if Raghunandan was guilty of a fraudulent

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1. Ibid., at pp.591-92.

act ... his conduct before the date of the decree cannot be taken into consideration' would seem to be wrong and misleading; because a lawful compulsion as such is not enough to make the son liable, if in the eyes of Hindu law, it would not bind him, e.g., to a fine. In any case, the principle laid down here was later severely criticized and overruled by a Full Bench of the same High Court, in Sheodhar v. Sitaram (A.I.R. 1962 Pat. 308, at p.313, c.2; for further details see p.364 ff.)

Our discussion so far would seem to show that unless the costs impugned are proved to be tainted with moral turpitude, the sons would be liable to pay them. However, in Perumal Chetty v. The Province of Madras,[1] (1955) the question came up in a slightly different form. The importance of discussing this case here lies in that it has clearly brought up the distinction between a certain aspect of the modern concept of costs and the charges which were imposed upon the litigating parties as envisaged in the śāstras.

In the present case, a Hindu father was appointed by the Court as next friend to continue a suit which was filed in forma pauperis on behalf of certain minors. The suit was dismissed for non-prosecution and the plaintiffs were directed to pay the costs of the defendants, but at the same time the next friend was also ordered by the Court to pay personally to Government, the Court-fee payable on the plaint. The liability was challenged by the son of the next friend on the grounds of daṇḍa and avyāvahārika. The Subordinate Courts had held that the obligation of the father was in the nature of a fine or penalty and the son's share could not be proceeded against.[2] But, on appeal to the High Court, it was held by Raghava Rao, J. to be neither in the nature of a fine, nor an avyāvahārika debt; however, the judge granted leave for appeal.

In the appeal, it would appear that the Counsel for the appellant sought to equate the liability in the present

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1. I.L.R. 1955 Mad. 1179.
2. Ibid., see at pp.1181-82.

case, relying on certain texts, with what the Kings used to impose upon litigants in those days. With reference to this argument, the Court said,

> "We have carefully gone through the texts, and we have no hesitation in saying that the conception of Court-fees at the present day is radically different from the danda which was imposed on parties to a litigation in the days of Smritis. Court-fee now is levied under the provisions of a statute which is primarily fiscal in its nature. Court-fee is payable at the time of the institution of the suit by the plaintiff. Under the law at present, the primary liability to pay Court-fee is always on the plaintiff. Whatever the theory underlying the levy of court-fee may be, one thing appears to us to be quite clear, namely, that it is not in the nature of a punishment ... The system of levy of Court-fee as it now obtains did not certainly prevail in the days of the Smritis. No fee was insisted upon at the time of the filing of the plaint. After the final disposal of the case, a successful plaintiff was liable to pay five per cent on his claim to the King as bhriti or compensation. This payment does resemble court-fees to a certain extent. But surely this is not in the nature of danda. There are numerous other provisions for collection of varying amounts from the plaintiff and the defendant which are called danda and are undoubtedly in the nature of fines or penalties. We shall give a few instances. When a debtor denied the fact of the debt altogether, and the creditor succeeded in establishing it, the debtor had to pay the amount decreed to the creditor, and an equal amount to the King as danda fine. If the plaintiff turned out to be a false claimant, he had to pay the King a fine, danda twice as much as the amount claimed by him. (Yājñavalkya, II.11)."[1]

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1. Ibid., at p.1183; for Yājñ.II.11, see above f.n.4, p.334. We may elaborate the point further: According to Manu, VIII.139

'Ṛṇe deye pratijñyāte pancakaṁśatamarhati /
Apahnave taddviguṇaṁtanmanoranuśāsanam // -

vide V.N.Mandlik, opp.cit., p.956; - that is to say, "On the debt being admitted to be due, the debtor deserves (a fine of) five percent; and in the case of denial, twice as much; such is the ordinace of Manu" - vide G.Jha, opp. cit., at p.162.

Now, as regards the payment of five per cent to the King by the debtor who admits his liability, Medhātithi says, ..."The man deserves this fine on account of his having transgressed the law by not satisfying the creditor's claims outside the Court and thereby forcing him to come up to the King." Ibid., at pp.162-163.

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Thus the distinction made between the modern concept of court-fee and daṇḍa, as it appears in the śāstric provisions, is quite clear; and, provided the plaintiff is made to pay it, i.e., the court-fee, no one should have any cause to object to its payment. But, in this case the father was certainly not the plaintiff; and even if the court-fee as such could not be construed as a fine, when its payment is imposed on him, would that liability of the father be considered as of the same nature as that of a real plaintiff? Obviously not; because the nature of the basis upon which the plaintiff would normally be held liable for such court-fee, and that of the father in this case, was apparently not the same. The fact would seem to be that, as the next friend, the father was entrusted with certain responsibility; but by allowing the minors' suit to be dismissed for default, apparently he had failed to fulfil that responsibility. If that was the basis (and one could hardly imagine anything else) for the imposition of the payment in question, then, in the absence of any reasonable cause to justify his conduct, one would be inclined to consider that it might have been in the nature of a penalty for his carelessness. Whether his behaviour was wilful or casual would depend on the facts; but the Court concluded that on this count the son was liable because in its opinion the liability was not in the nature of a fine.

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In fact the five per cent charge would seem more to be in the nature of a fee than a fine. This view would seem to receive support from Viṣnu, VI. 2o-22,

"If the creditor goes before the King and fully proves his demand, the debtor shall pay as fine to the King a tenth part of the sum proved. The creditor, on receiving the sum, shall pay the twentieth part of it ..." (my emphasis).

To similar effect are: Yājñ. II.44; Nārada, I. 132-134; Bṛhaspati, 11, 60-62; Yama (quoted in the Vivāda-ratnākara, p.78). - Vide, G.Jha, Comparative Notes, cit.above, at pp. 595-596.

Certainly the underlined would show that it could not be a fine, but a fee; for, the creditor, in going to the King, has not broken any law. Thus, the difference between the present court-fee and fees charged to successful litigants in general or the plaintiff in the example, i.e., the creditor, would seem to lie in the time of its payment; otherwise the nature of the liability in both of them would seem to be similar; because in the ultimate analysis, both the charges would appear to be extracted for meeting the cost of administration of justice.

As regards the second contention, i.e., the debt was avyāvahārika; the Court said,

> "The word has reference to the ideal of good conduct according to the notions prevailing at the material time. But we are unable to hold that any debt which the father ought not to have strictly contracted is necessarily a debt which is avyāvahārika. There should be an element of moral turpitude involved in the debt. It is only then that it could be called avyāvahārika."[1]

In the opinion of the Court, the father's liability to pay the court-fee was not an avyāvahārika debt and therefore the son was held to be liable for it. Unfortunately, as we do not know exactly why the father was made liable for the court-fee, it would be difficult to assess the nature of his behaviour concerning the case of the minors; and also to comment upon the merits of the decision. Otherwise this decision would seem to be well argued and comprehensive in its treatment of the subject-matter.

Finally, in M.Veera Raghaviah v. M.China Veeriah[2] (1975), where the father had incurred debts for meeting expenses of civil and criminal litigation against his own son, with the object of denying the son's legitimate rights to ancestral property and to assert his own exclusive rights to it, these were held to be avyāvahārika. In the course of its judgement, the Court said,

> "To make the son liable for the debts incurred by the father for defeating his legitimate rights is something opposed to all public morals and decency in life. If law is not concerned with public morality and decency in life, then it loses all moral authority to govern the rights of citizens. No court of law and justice can be a party to such a position. Avarice, unfilial and unnatural anger against his only child and son, and immorality are writ large on these debt transactions."3

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1. Ibid., at p.1186.
2. A.I.R. 1975 A.P. 350.
3. Ibid., at p.355, c.2.

Accordingly, the son was held not to be liable for the debts of his father. Thus, the decision would seem to make it quite clear that the son's liability to pay costs incurred by his father depends on the nature of such liability; and the nature of such liability would be determined with reference to the nature of the purpose for or out of which such liability arose.

In conclusion, it might be correct to say that although the modern concept of court-fee as such did not exist during the days of the smṛtis, certain śāstric provisions in this respect would, to a certain extent, seem to resemble it. However, awarding costs to deserving parties would to be unknown in those days. In these days, however, the debts incurred by the father for defending himself against criminal charges of any sort would seem to be legal or vyāvahārika, irrespective of their results. So also, if a debt was incurred to defend the rights of the family and safeguard its interests, it would be binding on the debtor's son. But, where the costs were due to the father's fraudulent, dishonest or unjust conduct involving moral turpitude, the son would successfully claim, or so it seems, immunity from the liability of his father.

VI.3.2 DEBTS ARISING OUT OF CERTAIN OBJECTIONABLE CONDUCT OR ACTS OF THE FATHER

It may be recalled that in the course of our enquiry into the definition of the term avyāvahārika, we have already brought out the sharp conflict of opinion that exists amongst the Courts, particularly in respect of the cases (see above pp.218-250) in which the liability incurred by the father had arisen from his wrongful acts. Also, we have noticed in the last section that even the same Court could not agree[1] as to

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1. See the decisions of the Patna High Court in Darbeshwari Singh v. Raghunath ; and Kirit Singh v. Chandrakali Kuar at pp. 340-343 above.

whether the costs awarded against the father due to his fraudulent[1] and dishonest conduct were avyāvahārika.

In order to simplify the discussion of these cases, however, we may classify them roughly into two groups. For, though in all such cases the liability would seem to have arisen due to some personal or material loss or damage caused to others by the father's conduct, in some of them the victim's loss might have resulted in gains to the father or his family, or the father might have indulged in such acts simply to hurt others.

(i) Cases involving acts of the father simply to hurt others:

Thus, in Durbar v. Khachar[2] (1908) a decree was obtained for damages to the decree-holder's property caused by a dam erected by the father, which obstructed the passage of water thereto. The son, after the death of his father, raised objection on the ground of the avyāvahārika nature of the

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1. It may be noted that in the middle of the last century there was some confusion as regards the son's liability in respect of his father's fraudulent debts or alienations. In the case of Bhuggobutty Dossee v. Kishen Nath Roy (1865):(1883) 3 Suth. W.R. 30, where the father had, in fraud of his creditors, made certain alienations of ancestral property. But the Court held that the son was bound by the alienation; even if the Court would seem to have been agreed with the principle that "A deed may be avoided on the ground of fraud" if the claimant was not party or privy to it. (at p.30, c.2 of the report.) However, in Baboo Beer Kishore v. Baboo Hur Bullub (1867):(1884)7 Suth.W.R.502, where the facts were similar, the Court, while rejecting the above view, said,
   "If, therefore, the father, during the minority of the son, alienated the properties in fraud of his creditors, such fraud would not bind the son, who was neither a party nor a privy to such fraud." (at p.505, c.2 of the report).
   Although in both these cases, the doctrine of avyāvahārika was not invoked, the fact is that the Courts were dealing with the father's immoral and illegal acts.

2. (1908) I.L.R. 32 Bom.348.

liliability. The Court held in favour of the son. In the opinion of the Court the scope of the term avyāvahārika was wide enough to include such liability of the father. It said,

> "that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices."[1]

Who could be sure that even a decent and respectable man would not be subject to some 'failing' or commit 'follies'? The view of the Court would seem to be more idealistic than realistic;[2] and its decision would seem to have lost the spirit of righteousness. It was not followed in Chhakauri Mahton v. Ganga Prasad[3] (1911) even though the facts of the case were almost identical. According to Mr. Justice Mookerjee,

> "The liability imposed by the Court upon the father to indemnify the person, with whose property he had improperly interfered, created a debt which might justly be recovered from the ancestral property in the hands of the son."[4]

The decision would appear to be just, though the ratio relied upon would seem to have been derived from the cases, none of which could be considered as an authority; for the facts of those cases were different from those of this case. Conscious of this, perhaps, the learned Judge would seem to be in favour of adopting

> "the distinction suggested by the Judges of the Madras High Court between a debt which follows as the result of an offence under the criminal law and a debt for which one is made liable on the ground of a breach of civil duty."[5]

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1. Ibid., at p. 351.
2. For a fuller discussion of this case see above pp.218-221.
3. (1911) I.L.R. 39 Cal. 862.
4. Ibid., at p.874; also, see above p.221.
5. Ibid., also see p. 871 where he mentions the distinction in connection with reconciliation of various decisions, involving different facts.

We will say something about this rather strained effort of reconciliation, and its effects on the son's liability under Hindu law (see below pp.390-97).

The case was followed in Chandrika v. Narain (1924)[1] in which ancestral property was sold as a result of certain damages awarded against the father for cutting trees and demolishing a building not belonging to him. In this case the father's action was considered to be a breach of civil duty; and that the family had benefited to a large extent.[2] Both these findings would appear to be doubtful. For, prima facie, the father's actions would seem to have made him criminally liable; and as regards the family's benefit, there is nothing in the report to support the finding. However, the Court held, following Chhakauri Mahton's case,[3] that the debt was neither illegal nor immoral, and therefore the sons were bound to discharge it.

However, the case of Deoba v. Babaia[4] (1927) which was referred to the Division Bench for answer of the question: Can a Hindu son be held liable for torts committed by his father during the latter's lifetime, even if these torts resulted in no benefit to the joint estate? After considering certain cases, the Court answered that, "the son can be held liable for torts committed by his father .... only to the extent to which the family estate has been benefited."[5]

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1. (1924) I.L.R. 46 All. 617.
2. Ibid., see p. 618.
3. Ibid., at p.619. It may be noted that facts of these cases are not only dissimilar; but, as regards the question of the family's benefit, Mr. Justice Mookerjee has said, (at p.874) that "If the liability of the son depends upon the nature of the act, the test of benefit to the estate becomes immaterial."
4. A.I.R. 1927 Nag. 337.
5. Ibid., at p.338, c.1. cf. Shrawan v. Bhiwa, (1903) 16 C.P.L. R.65, at p.68. This was a case for damages against wrongful attachment of crops etc. The father obtained no benefit. Sons were not held liable. However, the case was not defended on the ground of avyāvahārika.

Apparently, the reference is to 'torts' in general, and in the absence of the actual facts of the case, we could hardly comment upon this decision, except that it would seem to have relied[1] more on the judgement of Bowen, L.J. in Phillips v. Homfrey[2] (1883), an English case, than any Hindu law precedent to support it. One would not diminish the importance of this decision, however; firstly, because it would seem to justify why the son should be liable, and to what extent; and secondly, it has, by itself, created a precedent in modern Hindu law, which would seem to be just and reasonable; and therefore, it would appear to fit into the spirit of Hindu law.[3]

In Hemraj v. Khemchand[4] (1943) the facts proved would show that the father was held liable for his misconduct, i.e., he had allowed a promissory note belonging to the other party to become barred by acting fraudulently. The sons were held liable by the Privy Council on the ground that the liability in its inception was just and true, and their father's subsequent dishonest conduct would not affect the nature of the debt. As we have thoroughly discussed and criticized this case above (see pp.232-247) there is hardly anything to add.

In B. Naidu v. Kannan[5] (1943) the son had partitioned prior to the decree for damages against his father for trespass. Still, it was held that "The decree can be executed against the property in the hands of the son, even though he was not a party to the suit and had partitioned from his father prior to the decree."[6] The decision would seem to be controversial because the property which came to the son in the

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1. Ibid., at p.337, c.2; and 338, c.1.
2. (1883) 24 Ch.D. 439
3. If we refer to actual practice followed by orthodox Hindu Courts in the past (see above p.227,f.1) this rule would hardly seem foreign.
4. (1943) L.R. 70 I.A. 171.
5. A.I.R. 1943 Mad. 415.
6. Ibid., at p.416, c.2.

partition could not, afterwards, be considered of the father. Moreover, in view of the fact that the son would not be held liable for his father's debt incurred after partition, the view expressed here would seem to be wrong. It could be argued that the indebtedness related back to the time of the tort, but this was not argued or discussed in the judgement.

Also, one would suspect the correctness of applying section 53 of Civil P.Code (1908) to this case. For the section would seem to apply to the

> "property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative."[1] (My emphasis).

It would appear quite clearly that the section would apply to the property 'which is liable under Hindu law for the payment of the debt of a deceased ancestor'. So, the first question was whether the property in the hands of the son here was liable. It would hardly seem so; for, as pointed out above, after partition the son's property could not be held liable for his father's debt incurred (subject to the above envisaged 'relation back') after the partition. The property envisaged in the sec. 53 would seem to be the property to which the sons succeed after their father's death.[2] For these reasons, the decision would seem to be unsatisfactory.

It would appear from the cases discussed so far under this section, that the Courts would seem to be in favour of ~~the~~ holding the sons liable for such debts of the father. However,

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1. Ibid., at p. 416, c.1.

2. "S.53 Civil P.C., ... speaks of 'a deceased ancestor' and 'property of the deceased' which has come to the hands of the sons and it cannot be stretched to apply to the property which the sons obtain on partition with their father" - vide Govindram Dwarkadas v. Nathulal, A.I.R. 1937 Nag. 45, at p.49, c.1. This case was of a creditor obtaining decree aginst the father alone after partition. The sons were not held liable for the debt. However, in this case the father's liability was not concerned with any tort on his part. Cf. Krishnrao v.Deorao, A.I.R. 1963 M.P.49, at p.51, c.1. (for facts and decision see below p. 369).

when it came to damages due to malicious prosecution, their opinions seem to have been different.

Thus, in the case of Sunder Lal v. Raghunandan Prasad[1] (1924), the debts of the grandfather and father, due for damages awarded against both of them for malicious prosecution, were challenged on, among others, the ground of illegality and immorality. The case concerned a certain amount borrowed by the father on a hand-note. The facts may be stated as under:

It was held in the case, whereupon damages were ultimately awarded, that the hand-note was genuine and was duly executed by the father and that consideration thereon had passed and that the defendants knew fully that the hand-note was genuine and that they had falsely denied it in the original case for recovery of the money due thereunder and subsequently taking advantage of the dismissal of the suit had falsely and maliciously launched the prosecution against the decree-holder etc.; (at page 252 of the report).

Having regard to these fact, and while determining the nature of the liability of the father, the Court said that

> "It was an illegal and immoral act on the part of the defendants to lodge a maliciously false criminal case against the decree-holder. It is also opposed to public policy. The course adopted by the defendants could not possibly be said to be for the benefit of the family and was fraught with great risk to the family status and reputation. It was a highly tortious act. The prosecution was held to be false."[2]

The Court was of the opinion that the debt in question was undoubtedly avyāvahārika, and therefore the sons were absolved from the liability. It would appear from the above view that the liability was tainted because the act from which it arose was avyāvahārika. Here, the Court's approach would seem to be correct, because, in its view, the act, out of which the liability arose, was itself illegal and immoral, and against

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1. (1924) I.L.R. 3 Pat. 25o.
2. Ibid, at p. 253.

~~the~~ public policy; and therefore, it held that the debt was avyāvahārika.

This case was relied on in the case of Raghunandan Sahu v. Badri Teli[1] (1938). In this case, a part of a certain amount, raised on mortgage of ancestral property, was applied to pay decretal debts due to damages awarded against the grandfather for malicious prosecution. The sons and grandsons contended that the debt was an immoral or an illegal debt; and therefore, it was not binding on them. Their opponents' argument was that they were liable for all debts of their father arising out of a tort or civil wrong committed by him; though, they would not be bound by a debt which results from a criminal offence. However, the sons' Counsel argued that there are debts of a father with a stigma far short of criminality attached for which his sons are not liable, that a pecuniary liability arising out of a breach of a civil duty by the father involving moral turpitude constitutes an avyāvahārika debt, for which the sons were not held liable.

In view of this, the Court observed,

> "We are however of the opinion that no hard and fast rule can be laid down, and the Courts have got to look at each debt and the circumstances under which it arises in order to find out whether it is a vyāvahārika or an avyāvahārika debt. In the case of a decretal amount, like a decree for damages, the act, which is the foundation of the suit for damages, has got to be scrutinized, and one has got to see whether the act was a vyāvahārika act or an avyāvahārika act, that is an act 'repugnant to good morals' or an act which is 'opposed to fair dealings'."[2] (My emphasis).

These remarks would not only seem to represent the proper approach which the Court should adopt while dealing with such debts of the father; but also would appear to echo the spirit of righteousness and fair play.

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1. A.I.R. 1938 All. 263.
2. Ibid., p. 265.

After explaining what actually precedes the decree[1] for damages for malicious prosecution, the Court held that

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1. In this case, from the information on the record all that the Court knew was that several persons had obtained decrees for damages for malicious prosecution against Khedu Teli. In view of this the Court had to rely on certain things that normally had to be proved in such suits for damages.

We see no reason to disagree with the decision. However, we may be allowed to undertake a speculative exercise. In Satdeo Prasad v. Ram Narayan, A.I.R. 1969 Pat.102, though the doctrine of Pious Obligation of the son was not invoked, and no question as to 'illegal' or 'immoral' debt arose; we think that, being a case of damages for malicious prosecution, its discussion here might be worthwhile.

Briefly, the facts were that the plaintiffs were prosecuted for stealing fish, but were acquitted. The defendant was an eye-witness. Before the settlement of the fishery right with the defendant, the ditch was open for all the villagers, but the occurrence took place after the settlement. The concurrent decisions of the Courts below had found that the plaintiff had failed to prove that the criminal case instituted by the defendant was maliciously false and without reasonable and probable cause. Because the defendant was the Karta of the joint family other defendants were impleaded by the plaintiffs

The High Court held in favour of the plaintiffs; but the decision would seem to be controversial. In the first place the Court presumed that there was no reasonable and probable cause for the prosecution in spite of the fact that P.W. 3's testimony was in this respect clearly in support of the defendant; and that the defendant had the settlement of the fishery right in his favour at the material time. Also the Court would seem to have relied on the acquittal alone for imputing malice to the defendant (at p. 105, c.1). The facts of this case differed materially from the cases relied upon for the presumption. Thus, seen in this light, the findings would seem to be clearly unsupportable and unjust.

Now, supposing there were sons in the family and the plaintiffs were to rely on their pious obligation for payment of the damages; and if the Court were to rule in the matter what would be the likely result? If the Court had known nothing except the decree for the damages, as in the case of Raghunandan Sahu's case, the decision would have been given in favour of the sons. But had the facts of the original criminal prosecution etc. known to the Court, then, having regard to the facts of the case, the plaintiffs might have failed and no question of the sons' liability would have arisen. However, had the Court found in favour of the plaintiffs; then, could, in view of the facts, the debt be considered avyāvahārika? In this case, one would think not. For, there was a genuine reason, i.e., protection of fishery right, for commencing the proceedings. Unless, the fahter's intention was otherwise than protection of his legal rights, the debt could not be avyāvahārika.

"The act of Khedu Teli in bringing a malicious complaint without reasonable and probable cause was a tortuous act opposed to public policy or decent vyavahāra and, as such an avyāvahārika act;"[1] and the pecuniary liability arising therefrom was not binding on his sons.

In conclusion of this section as a whole, it may be said that whenever the conduct of the father, whether in cases involving malicious destruction[2] of other's property or right, or those of malicious prosecution, has resulted in incurring pecuniary liability the son might successfully claim exemption from his liability. Moreover, our discussion would show that while determining the nature of such debts of the father, the facts, the circumstances and the conduct of the father antecedent to the incurring of the debts concerned could be looked into;[3] and upon the finding of such enquiry would depend the liability of the sons.

(ii) Cases involving the father's acts leading to some benefit to him or the joint family at the cost of others.

At the outset, we may remind ourselves that the son's liability to pay his father's debt depends primarily upon the nature of the debt, and, as already noted, the test of benefit

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1. A.I.R. 1938 All. 263, at p.265, c.1.
2. Although the weight of modern authorities would seem to be in favour of holding the son liable (see above pp.349-354), the observation made by Mr. Justice Venkatasubba Rao, quoted at p.243 above, (i.e. "I would understand Kātyāyana's text to mean that the injury inflicted, or damage caused, should be the result of the wanton and flagrant violation of another's right from anger, engendered by malice or revenge, for instance, an act of incendiarism. To such and similar cases only, the text of Kātyāyana is applicable."), read with decisions involving malicious prosecution, would seem to point towards exemption of the son from such debts of the father.
3. For a similar view, see Sheodhar v. Sitaram, A.I.R. 1962 Pat. 308, (F.B.), discussed below, at p.364ff; also see, M.N.Srinivasan, Principles of Hindu Law, 4th edn., vol.II, (Allahabad, 1970), p.1649. J.D.M. Derrett, C.M.H.L., cit. above, would seem to agree with this view at p. 104.

is immaterial. However, it is the fact of actual benefit which arose out of the father's wrongs or crimes that seems, as will be seen presently, to have influenced certain decisions of the modern Courts, while determining the son's liability to pay such debts of the father. The cases involving the father's liability due to mesne profits, civil or criminal misappropriation etc. would generally fall under this category.

(a) Cases involving mesne profits

Perhaps the first case directly on the point was that of Musst. Nanomi Babuasin v. Modun Mohun[1] (1885). In this case, the father had wrongfully ousted his lessee, who sued him to recover possession and for mesne profits, and obtained a decree, according to which a large sum of money was awarded for mesne profits. On behalf of his minor sons, it was contended that as the liability had arisen in respect of a wrongful ouster by the father alone, the sons' shares were not liable for such debts of the father. On the other hand, the Counsel for the Respondents contended that the joint family had benefited by the wrongful ouster effected by the father, and "the decree for mesne profits was in effect for restitution of what the family had wrongfully received and benefited by". (See p. 14 of the report.) The Privy Council, while considering

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1. (1885) 13 I.A. 1. Cf. an obiter dicta in Virasvami v. Ayyasvami (1863), 1 M.H.C.R. 471. This was a suit for damages for trespass and non-delivery of possession of certain houses. No son was involved but the Court observed at p.477 that
   > "There is no evidence of Ayyasvami's having sons. If he had, they would no doubt, be entitled to shares in their father's moiety, and so the property available for the plaintiff would, to the extent of their shares, be reduced; and except in this way the existence of sons would not, we think, affect the plaintiff's right."

   This view would seem to exclude the son from such liability of the father.

   In Beni Pershad v. Puranchand, (1896)I.L.R.23 Cal. 262, a decree for mesne profits was obtained against the father, but it was found later in the appeal that the father was never really liable for any mesne profits in the first place, and therefore, the sons were held not liable (see p.274 of the report.)

the nature of this debt agreed with the High Court's finding (at p. 19) that "it must be taken as a joint family debt." In other words, it was not immoral or illegal so as not to bind the sons. Although there was no further discussion as to the nature of such debts, the decision may be construed as laying down that the decree for mesne profits was in effect for restitution of wrongful gains made by the father, and by which the family had benefited.

This case was followed in Karan Singh v. Bhup Singh[1] (1904). The sons had challenged the liability incurred by their father due to mesne profits. In spite of these decisions, the sons in Peary Lal Sinha v. Chandi Charan Sinha[2] (1906) contended that such debts of the father were tainted with immorality and hence they were not liable. The father had become liable to pay a large sum of money because he had kept the real owner out of possession of his property and had reaped profits therefrom. The Court rejected the contention of the sons, saying that,

> "By unlawful receipt of these profits, the judgement debtor enriched his own estate which has now by survivorship passed into the hands of the Appellants. We cannot discover any intelligible principle upon which a debt of this character may be described as immoral and illegal."[3]

Thus, in the opinion of the Court, the initial unlawful and immoral act, which led to the benefit of the joint family property, could not render the resulting liability as avyāvahārika.

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1. (1905) I.L.R. 27 All. 16, (F.B.) at p.20. Also, reliance was placed on a previous decision of the High Court, in Kishen Lal v. Banarsi Das, first Appeal No.80 of 1902 (unreported case), wherein the facts were similar, and the sons were held liable.
2. (1906-07) 11 C.W.N. 163. This case is discussed above at p.238.
3. Ibid., at p.169, c.2.

The case of Ramdeo v. Musst. Gopi Koeri[1] (1911) involved a question as to whether the grandson was liable for interest on mesne profits, though the decree for mesne profits was given against both the father and grandfather. The Court held that he was liable. It may be pointed out here that while determining the nature of the father's liablity due to mesne profits, no reference was made to the śāstric rules in any of the above cases.

However, in Ramasubramania v. Sivakami Ammal[2] (1925), where the father's debts due to mesne profits were challenged by his sons on the ground that under Hindu law they were not bound to pay such debts, great stress was laid on śāstric texts, particularly that of Kātyāyana, in order to determine the nature of such debts. On behalf of the sons it was argued that due to misunderstanding of Kātyäyana's text (i.e., "Having done an injury to another, or destroyed his things, through anger, if anything is promised in satisfaction, it is called a debt for anger.")[3], by Colebrooke in his Digest, lawyers and judges had not correctly appreciated the significance of the expression 'debt incurred under the influence of wrath' occurring in Bṛhaspati, and that, if that expression was properly understood, as explained in Kātyāyana's text, then a decree for mesne profits would come within the scope of that explanation and was therefore a debt which fell within the category of debts which the sons were not bound to pay.

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1. (1911) 16 C.W.N.383. In the case of Yanamandra Papiah v. Lanka Subbasastrulu (1914) 27 M.L.J. 276, though the father's liability arose out of mesne profits, his sons objected to it on the ground that the decree was passed against the father alone, and therefore they were not liable; but they failed. The Court said (at p.277) "that this plea is bad"; and held that the debt not being one which the sons were not liable to pay under the Hindu law, their interests also could be proceeded against.

2. A.I.R. 1925 Mad. 841. For further discussion, see above pp.222-223, and 243.

3. Ibid., at pp.846 and 853. The verse is Kātyā. 565. Also see above p.243, for further discussion.

However, both the judges on the Bench rejected the argument. Madhavan Nair, J. rejected it on the ground that the debt was not shown, "in any sense, to have been incurred in anger";[1] while Venkatasubba Rao, J. observed,

> "I shall now, in the light of this text of Kātyāyana, discuss the son's liability for mesne profits. Injury to another, or his property, from wrath, is what is contemplated. Is there any necessary connection between the awarding of mesne profits and destruction of another's property by wrath?
> "I would understand Kātyāyana's text to mean that the injury inflicted, or damage caused, should be the result of wanton and flagrant violation of another's right from anger, engendered by malice or revenge, for instance, and act of incendiarism. To such and similar cases only, the text of Kātyāyana is applicable."[2]

In his opinion, therefore, the text of Kātyāyana would not exempt the sons from their liability to pay in this case. We feel inclined to agree with the Court on the point; but it may be said that if the above construction of Kātyāyana is correct, (for our comment, see above p.243-44), the father's obligation arising out of his acts such as malicious prosecution, or destruction of another's property, discussed in the preceding section, would seem to fall under the scope of this rule. However, the Courts would seem to be in favour of holding the son liable in such cases (see above p.348 ff.)

Besides the above text, the Court had referred to other texts, and had discussed certain cases dealing with another general term used in the texts, namely avyāvahārika, in order to see whether or not the debts in question would fall under that category. It was argued by the son's Counsel, that the son should not be held liable, if there was an element of impropriety - however small - in the father's conduct in incurring the liability. In the opinion of the Court, however, it was an extreme argument which was not warranted by the texts

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1. Ibid., at p.853, c.2.
2. Ibid., at p.847, c.1.

of the Hindu law, nor was the weight of modern authority in its favour. In this connections, the Court observed,

> If it be borne in mind, that the debts condemned by the Smritis in this connection are debts such as those due for spirituous liquor, or for lust, or for gambling, it will be obvious that the ancient law-givers did not intend the sons to enjoy immunity, merely because the father's conduct was not above reproach, judged by the highest standards of morality."[1]

Broadly speaking, this observation would seem to be correct; but could it be considered that an act of wrongful ouster on the part of the father would amount to a merely reproachable conduct without taint of immorality so as to bind the son? The Court held so; for, according to the propositions deduced, after discussing a number of cases by the Court for the purpose of determining the son's liability, the debts were not immoral. These propositions were: "(i) If the debt is in its inception not immoral, subsequent dishonesty of the father does not exempt the son. (ii) It is not every impropriety or every lapse from right conduct that stamps the debt as immoral. The son can claim immunity only, when the father's conduct is utterly repugnant to good morals, or is grossly unjust or flagrantly dishonest."[2]

Although we have already criticized these propositions (see above p.223 ff), it may be pointed out here that of the cases discussed before laying down these propositions not a single case concerned the father's liability arising out of mesne profits. It was only after stating these rules that the Court turned to the cases on mesne profits, (at p.847 and 854-6), and found that they were all in agreement with its own decision. One might debate the correctness as well as applicability of these propositions to such cases as this. For example, it might be argued whether the first rule could be applied to the liability due to wrongful ouster. Moreover, it could not be ruled out that other judges, such as those who decided Govindprasad v. Raghunathprasad (see above p.223 ff),

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1. per Venkatasubba Rao, J. Ibid., at p.844, c.2.
2. Ibid., at p.845, c.2.

might settle for less than the highest degree of immorality to exempt the son from his liability. However, in spite of the controversy surrounding these propositions, it would appear that the decision was just and would find support not only among modern authorities but also in the spirit of Hindu law. For the intention of the śāstrakāras in exempting the son from his liability was never, it seems, to enrich him by way of such means as wrongful gains of the father at the cost of other innocent people. On the contrary, Hindu law insists upon payment of all just debts of the father.

In the case of Pashupat Pratap Singh v. Lalat Bahadur Singh[1] (1944) the father was sued for recovery of possession and mesne profits, because he had remained in possession after expiry of a theka (lease) granted to him. After his death, his sons were impleaded as his representatives. The Lower Court refused to pass decree for mesne profits because in its opinion the father's act was wrong and immoral. Hence this appeal.

While passing a decree for mesne profits, the High Court said of the father's conduct that

> "It does not seem to us that there was anything immoral in his conduct. If the transaction had been properly a lease he would merely have been holding over; if it was a licence he was merely holding in continuation of the permission granted to him, and, as he died before he could put in any written statement, we do not know what excuse he had for remaining in possession of the property. His conduct might have been legally wrong, but it does not necessarily follow that he was acting in bad faith or that he had no reason which in his view might be sufficient for retaining possession. We do not think it can be concluded that every trespasser in law is guilty of immoral conduct."[2]

Although no authority is cited, the opinion of the Court would seem to reflect the general line adopted by the Courts in respect of such liability of the father. Besides, it has the merit of explaining how an illegal act might not necessarily be immoral. The sons were made to pay the mesne profits.

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1. I.L.R. 1945 All. 5
2. Ibid., at p.6

In the case of Laxmipatirao v. Kristrao[1] (1950), the son had challenged his father's liability incurred by way of mesne profits on the ground that it was avyāvahārika. In support, the learned Counsel for the son relied upon the decision in Govindprasad v. Raghunathprasad.[2] According to the headnote of the decision relied upon "A debt contracted by a Hindu father for the purpose of depriving the rightful owner of his property is an avyāvahārika debt, which it is not the pious obligation of the son to pay."[3] However, the

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1. (1950) 52 Bom.L.R. 342.
2. (1938) 41 Bom. L.R. 589, (F.B.) or I.L.R. 1939 Bom. 533, (F.B.).
3. This headnote appears to have been based on the judgement of Wassoodew, J., i.e.,

   "Consequently I agree that in this case it can reasonably be said that the action of the son-in-law in depriving the rightful owner of his property cannot be defended upon the ordinary standard of honesty, and therefore, I agree with order proposed."

   Ibid., at p.606. (The son-in-law in this quotation was the father.)

   However, Beaumont, C.J., who proposed, it seems, the order, came to his conclusion in these words,

   "The judgement of the trial Court and of the Court of Appeal is based on the view that defendant No.3, amongst the other defendants, was in possession of the property to which the plaintiff was entitled, and it is plain that he never had any sort of right to such possession ... According to the judgement of the Court of Appeal, most of these moneys had been spent in criminal proceedings and in litigation, and in my judgement there could be no sort of justification for that conduct on the part of the defendant No.3. I think, therefore, that the claim against him was in respect of a liability essentially dishonest in character, and incurred for a dishonest purpose. That being so, I think it is a class of debt for which the son is not liable under the pious obligation to pay his father's debts." (My emphasis). Ibid., at p.602.

   According to the third member of the Full Bench (Lokur, J.) "Defendant No.3 needlessly intermeddled with another's property and made it disappear. His conduct was certainly 'opposed to good morals' and the respondent cannot be held liable for the debt arising out of such conduct of his father." Ibid., at p.609.

   Seen in the light of the above opinions of the other two members of the Full Bench, it is evident that the headnote (as well as Wassoodew, J.'s opinion) does not seem to convey the important half - i.e., the purpose for which the moneys were spent. It is for this reason, the wording of the headnote would not seem to represent the correct law laid down by the Full Bench. For further details, see above pp.231-32 and below pp. 381-82.

~~However, the~~ High Court distinguished that case on the ground of the facts, which were different from those of the present case; and relying on the decision in Ramasubramania v. Sivakami Ammal, discussed above (see pp. 359-361), held that the son was liable because the debt was not avyāvahārika.

The Court was of the opinion that "a Hindu son is bound to restore to those lawfully entitled money which his father has unlawfully retained."[1] As stated, the principle would not seem to militate against the principle of Hindu law, i.e., the son is liable for all just debts of his father.

In the case of Sudhansu Kumar Singh v. Mt. Ramjhari Kuer,[2] (1957) the father had obtained delivery of possession of certain property belonging to an agnate of his upon the authority of a decree of the Court, but later the decree was set aside and a decree for mesne profits was passed against him. His son objected on the ground that the debt was avyāvahārika.

However, in the opinion of the Court, the act of the father in taking delivery of possession by the authority of a valid decree could not be said to be a fraudulent or dishonest act. It was therefore held that the decree for mesne profits against the father was not in respect of debt tainted with immorality, and that the debt incurred was not an avyāvahārika debt within the meaning of Hindu law. Hence, the son was liable to pay the decree for mesne profits passed against his father. Apparently, the decision would seem to be correct, for there was nothing wrong in the act of the father so as to taint the consequent liability.

In the case of Sheodhar v. Sitaram[3] (1962) a decree for mesne profits was passed against the father, who had forcibly

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1. (1950) 52 Bom. L.R. 342, at p.348. This is a part of the famous quotation, originally from the decision in Natasayyan v. Ponnusami, discussed above pp.237-239; also see below p.376.
2. A.I.R. 1957 Pat. 115; (for the Court's decision see p.117, c.1.)
3. A.I.R. 1962 Pat. 308 (F.B.).

dispossessed a rightful person from the Math properties, and enjoyed usufruct of the same along with others who sided with him in forcibly dispossessing the Mahant. After his death, his sons objected to execution of the decree against them on the ground that the liability was avyāvahārika, and hence they were not liable.

The questions to be decided were (a) whether the appellants were liable, in the circumstances of this case, to satisfy the decree for mesne profits; and (b) whether the Court could look into the conduct of the father before the passing of the decree, in order to decide whether or not the debt was avyāvahārika.

As regards question (b), the Full Bench came, after discussing a number of cases on the point, to the conclusion that

> "the facts, the circumstances and the conduct of the father antecedent to the incurring of the debt in question could be looked into to ascertain the nature and the character of the debt so as to be binding on the son as being not Avyāvahārika."[1]

On a careful consideration of the authorities discussed in this context, one would unhesitatingly agree with this view, because it represents the correct legal position.

Regarding question (a), however, the Court answered in the negative. It was argued on behalf of the respondents that 'a decree for mesne profits can never in law be an avyāvahārika debt. For, whatever may be said with respect to the forcible possession taken by the trespasser, his receipt of the usufruct of the land on cultivation of the same cannot be a dishonest act on his part.' In support of this contention, reliance was placed on the cases[2] of Nanomi Babuasin v. Modun Mohun, Karan Singh v. Bhup Singh, Ramasubramania v. Sivakami, Peary Lal v. Chandi Charan, Laxmipatirao v. Kristrao and Sudhansu v. Mt. Ramjhari. These were all cases of mesne profits in which the sons were held liable.

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1. Ibid., at p.313, c.2. Thus, the decision in Kirit Singh v. Mt.Chandrakali Kuar, A.I.R. 1951 Pat.587 (discussed above pp.341-343) was overruled.

2. We have already discussed all these cases, see above pp.357-364

After discussing these cases the Court said,

> "The decisions in the cases cited above depended on the facts and circumstances of each case and none of these cases is an authority for the broad proposition of law, as submitted by counsel for the respondents, that a decree for mesne profits can in no case be legally held to be immoral or avyāvahārika. These are all cases in which, on the evidence, the debts were vyāvahārika, and therefore, they have no application to the present case, the material facts of which are different from the facts of those cases."[1]

The distinction would seem to have been based upon the fact that the father in the present case, unlike those cases, had dispossessed the Mahant by force. The use of force in this case affected the nature of his act, in that it was the most unjust and dishonest conduct on the father's part. This was not, it would appear, the situation in the cases relied on, though dishonesty was present at least in some of those cases (see for example Ramasubramania's case.[2])

Then, turning to the Counsel's argument, the Court said,

> "No doubt, the act of trespasser in forcibly dispossessing the true owner from the land is most unjust, but it is equally unjust and dishonest on his part to retain the same forcibly after having dispossessed the true owner. The debt incurred by such trespasser due to his dishonest act of retention of possession is, therefore, tainted with immorality and illegality and is Avyāvahārika so as not to be binding on his sons."[3]
>
> (My emphasis).

And, after referring to certain other cases on avyāvahārika debt, the Court came to the conclusion that the conduct of

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1. Ibid., at p.314, c.2.
2. A.I.R. 1925 Mad. 841, at p.848, c.2. Also see above p. 360.
3. Ibid., at pp.314-315.

the father "in forcibly dispossessing the Mahant and retaining possession of the Math properties was undoubtedly grossly unjust and flagrantly dishonest."[1] His sons, therefore, were not held liable for the same.

If we go by the terminology of the decision, it would be quite clear that the Court has followed literally the propositions laid down in Ramasubramania's case (see above p. 361) - particularly the second proposition - which we have already criticized. In view of what we have said there (at p. 361 above), once again, it may not be out of place to ask whether even this decision would fit into what was contemplated by the law-givers while laying down the exception which exempts the son from his liability under pious obligation.

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1. Ibid., at p.316, c.1.
The legal position obtained after this decision has been summed up as follows:

> "These cases, therefore, were decided on their particular facts, and the principle deducible from them cannot go beyond this that where the conduct of the father in doing any act is not tainted with immorality, any debt resulting from such a conduct, though that may have been incurred even due to subsequent dishonesty of the father, is binding on the son. They are, however, no authority for the propostion that, even if the conduct of the father at its inception is dishonest and unjust, the debt resulting from such a conduct would be binding on his sons; rather, on a consideration of these cases, referred to above, the law on the subject seems to be that a son is exempted from the liability to pay a debt of his father under the rule of pious obligation if the debt resulted as a consequence of an act of the father which, when that act was done, was tainted with immorality."

M.N. Srinivasan, cit. above, at p.1652.

It may be pointed out that this summing up would seem to be inaccurate in the sense that it does not represent the difference in degree of dishonesty etc. in the father's conduct while committing an act which would seem to be the basis upon which the act of the father might be considered vyāvahārika or avyāvahārika.

Supposing that the usufruct enjoyed by the father was not applied for immoral purposes, the decision in this case would seem to mean that the decisions relied on by the repondent's Counsel were correct, because the conduct of the father in those cases, though unjust and dishonest (in some of them at least) to a lesser degree than in the present case) was acceptable to the Courts as not being immoral, i.e., it was vyāvahārika, and therefore, the son must pay. However, the degree of the father's unjust and dishonest conduct right from the start in this case was so high that it could not be condoned in view of its seriousness and, therefore, it amounted to 'immoral and illegal' conduct; and hence his sons need not pay; for the liability arising out of such conduct would be avyāvahārika. In other words, if you evict a rightful owner from his property in a comparatively civilized manner etc. and thereby become liable for mesne profits, your sons must pay; but, if you do the same act by (as it were) hitting the owner in the face, your sons need not pay. It would seem impossible to fit this kind of principle of law into the concepts of righteousness and justice, which are the basis of vyavahāra, and which the śāstrakāras as well as the Courts of law have professed to uphold. Of course, it may well be argued on the other hand that the śāstras held many debts avyāvahārika etc. because they were debts which in the eyes of dharma must be paid by the offender or not at all. (see above p. 40 and f.n.5 there). However, can we consider the liability in question to fall under this category? (see below p.390 ff for our answer).

In view of the facts and the circumstances of the case, the decision might have been correct, but it might be emphasized that as a general rule the test of the nature of the father's conduct alone would seem (as shown above at pp.225-228) to be inadequate, and therefore might be supplemented, while determining its nature, by looking into the purpose of such conduct of the father.

In the case of Krishnrao v. Deorao[1] (1963) a decree for mesne profits was passed against the father along with others. One of them instituted the present suit, after the death of the father, against the sons for the recovery of the father's share of the mesne profits, which he claimed to have been paid to the decree-holder. Although it would appear from the report that one of the contentions on behalf of the sons in this appeal was based on the doctrine of avyāvahārika, we could not be sure whether or not it was raised in the Lower Courts. Whatever it might have been, the Court, without citing any Hindu law authority by name, decided the issue in the following terms:

> "A liability for a tort does not amount to a debt; it is distinct from an obligation legally incurred in consequence of a contract or quasi-contract. Where a father is guilty of a civil wrong and a decree is passed against him, it does not become an Avyāvahārika debt. His son is bound to pay subject to the condition that he has received assets from which the liability can be discharged."[2] (My emphasis).

Only the underlined part of this quotation would seem to be on the point. However, the principle of law enunciated here is stated in general terms; and though right in principle generally as well as in the context of the facts of this case as stated, it would seem to go too far. For it does not seem to take into account the cases in which the son might successfully claim exemption on the ground of the father's immoral conduct while committing the tort concerned, as happened in the case of Sheodhar v. Sitaram (see above pp.364-368).

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1. A.I.R. 1963 M.P. 49.

2. Ibid., at p.51, c.1. It may be noted that the first part of this quotation would seem to apply to a case in which the father died after committing a tort, and where no decree for damages existed against him. See, Deoba v.Babaia, A.I.R. 1927 Nag. 337, at p.338, c.1. (discussed above at p. 350.)

In the conclusion of this sub-section, it may be said that the father's liability due to mesne profits has generally, in view of particular facts and circumstances of each case, been considered to be vyāvahārika and therefore the sons were held liable in most of the decided cases. However, in a case where the conduct of the father, while wrongfully ousting the rightful owner from his property, was found to be grossly unjust and flagrantly dishonest, the resulting liability was held to be avyāvahārika and hence the sons were not held liable. As the decisions in all these cases were based on their particular facts and circumstances, no general rule could properly be deduced; but, upon a closer examination of these decisions, it would appear that in most of them the Courts preferred to consider the father's liability as in the nature of restitution, and hence not immoral or avyāvahārika.

(b) Cases involving misappropriation of other's property

(i) Criminal misappropriation or theft cases:

We have already pointed out that the orthodox Hindu Courts had held the son liable not only for the repayment of the actual amount stolen by his father but also to pay compensation in respect of the murder committed by the father, to the son of the murdered officer (see above p.227, f.n.1). This trend would seem to have been in existence upto 1872. For it is stated that "In those days the Government permitted wrong-doers to make restitution and compensation to the wronged, and thus escape trial and punishment."[1]

Perhaps, a similar view might have influenced the decision in Kartar Singh v. Harji Mal[2] (1878). In this case the father

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1. Dulleep Singh v. Sree Kishoom Panday, (1872) 4 N.W.P.(H.C.R.) 83, at p. 84 (also see p.85). In fact, this was what exactly happened in this case. A Hindu father having been implicated in a decoity was imprisoned. He sold ancestral property to make full restitution to the injured party. The sale was impeached on behalf of his minor sons as not for necessity. The sale was upheld on the ground that it was made for meeting the grave calamity affecting the whole family: i.e., death or banishment of the father.
2. (1879) P.R., No.128, p.282; (also, see above p.229).

stole and converted to his own use certain property belonging to the defendant, who sued and obtained a decree against the father for the value of the property. The debt was challenged on behalf of his minor son on the ground of immorality. However, the Court said,

> "It is impossible to hold that the debt created by the decree is a debt contracted for an illegal or immoral purpose, merely because the act from which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral."[1]

We have already seen that such a view could be wrong if the debt created by a decree may be shown to be falling under excepted debts according to Hindu law, e.g., a fine, (also, see below Mahabir Prasad's case.) It would appear that the decision might have been based on the precedents of the Court; or perhaps inadequate knowledge of the śāstric Hindu law on the part of Counsel for the son, or even the judges themselves, might have led the Court to this decision. However, the decision would seem to fit into the practice followed by the orthodox Hindu Courts.

The question as to whether the share of a son could be sold in execution of a decree of a Civil Court against his father on account of the father's criminal embezzlement was considered in Mahabir Prasad v. Basdeo Singh[2] (1884). Here, the sons had contended that their shares were not liable, because in view of its nature the debt would not be binding on them. The father was sentenced to imprisonment, and while he was serving his imprisonment, he was sued in the Civil Court.

After referring to certain Privy Council decisions, Stuart, C.J., said,

> "To my mind it is a very serious question whether the criminal element in the conduct of the father by reason of the embezzlement of which he was

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1. Ibid., at pp.282-283.
2. (1884), I.L.R. 6 All. 234.

> convicted did not, so far as the plaintiffs' rights were concerned, vitiate the proceedings ending in the sale from the beginning, in as much as it was an inherent vice which tainted the sale, and could not be got rid of, or be removed by the mere fact of the decree in the Civil Court."[1] (My emphasis).

The sale was held to be for an immoral purpose, i.e., for raising money to meet the father's liability arising out of his immoral and illegal conduct (embezzlement).

Although the above view would show how a decretal debt might not be binding on the son, it would also raise a question: should the Court determine the nature of the liability in such cases by reference to the nature and purpose of the father's original act, or, as happened in this case, by reference to that of the resultant decretal remedy (i.e., sale in execution of a decree for compensation)? Before answering the question let us inquire into other decisions on the subject.

In Pareman Dass v. Bhattu Mahton[2] (1897) the facts were similar. The decision may be summed up thus: that there was no 'debt antecedent' to the decree in this case; that even if the right to obtain damages for the theft or misappropriation could be said to have created a 'debt', the debt was tainted with illegality or immorality[3], and hence the sons were not liable. This case was followed in M^cDowell & Co. v. Ragava Chetty[4] (1904) wherein the father had misappropriated money under circumstances which, in the opinion of the Court, constit-

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1. Ibid., at p.237.
2. (1897) I.L.R. 24 All. 672. In this case the father was found guilty of theft, and a decree for damages was obtained against him. In execution of that decree ancestral property was sold. The sons brought suit to recover their shares on the ground of immoral nature of the liability of their father.
3. Ibid., at p.676.
4. (1904) I.L.R. 27 Mad. 71. In this case Natesayyan's case (see below p.376) was distinguished and explained. According to the Court, the conduct of the father in that case, though dishonest, in the circumstances of the case, amounted to nothing more than a breach of civil duty.

uted the taking itself a criminal offence, and therefore, his minor sons were held not liable. It may be noted that in this case the criminal nature of the initial conduct of the father, who was not even charged with a criminal offence, was held to be sufficient to relieve the sons.

In Jagannath Prasad v. Jugal Kishore[1] (1925) the father's liability was challenged on the ground of immorality as it was found that the same arose out of the father's criminal misappropriation. While considering what constitutes 'immorality' of a debt so as to enable the sons to escape the liability, the Court observed,

> "We think that the test to be applied in a case of the kind now before us is whether or not the action of the father which resulted in the debt was infected with an element of criminality. Whether such an element is established or not and the degree of infection which will support a plea of 'immorality' must be a question for determination of the facts of each case; and though a conviction for misappropriation or other cognate offence may be good proof of such an element, proof of a previous conviction is certainly not essential. The criminality and its degree may be inferred from a consideration of the whole facts."[2]

It was held, on the basis of the presence of such criminal element here, that the debt was 'immoral' and therefore the son was not liable. This case was followed in Bai Mani v. Usafali Bhudar[3] (1931) where it was found that the father had criminally misappropriated his ward's property. Also to the same effect is Widya Wanti v. Jai Dayal[4] (1932), wherein the father had embezzled a large amount of money of his employer. In both these cases, the sons were held not liable. In the latter case, after referring to certain authorities, Bhide, J. said,

> "I have carefully considered these authorities, and although there seems to be some divergence

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1. (1926) I.L.R. 48 All. 9. For the facts, see above p.228.
2. Ibid., at pp. 10-11
3. (1931) 33 Bom. L.R. 130.
4. A.I.R. 1932 Lah. 541.

> of opinion as to whether the sons of a Hindu father are bound to pay his debts, which are the result of mere breach of civil duty, the authorities seem to be practically agreed that they are not so bound if the debts result from an act amounting to a criminal offence, as in this case."[1]

The above view finds support in Toshanpal Singh v. District Judge of Agra[2] (1934). In this case the father was secretary of a school committee, authorised to operate its bank account for specific purposes. However, he was found to have drawn over Rs. 30.000 for unauthorised purposes. In the opinion of the Privy Council the drawings in question were a criminal breach of trust, and that under Hindu law the sons were not liable; though so far as authorised drawings were concerned (money drawn for authorised purposes but not accounted for) the sons were held liable. It may be pointed out here that the distinction based on civil and criminal liability has not been universally accepted (see above p.241, f.n.2).

In Surji Sethani v. Ratanlal Chamria[3] (1943) the liability arose out of refusal to return certain ornaments and cash which were given to the grandfather for safe custody. The Court held that a debt which arose out of criminal breach of trust was avyāvahārika and the ancestral property in the hands of his grandsons, after his death, was not liable for such debt. One would wonder whether the liability, in view of the facts of the case, was, at the time it arose, tainted with criminality. For the valuables were voluntarily given and accepted, and the alleged breach of trust took place at a later date. The decision would prove, apparently, that the Courts are not unanimous on the point.

In Perumal v. Devarajan[4] (1974) the father had incurred liability by way of a theft. After his death his sons contended

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1. Ibid., at p.544.
2. (1934) I.L.R. 56 All. 548 (P.C.)
3. (1943) 47 C.W.N. 266.
4. A.I.R. 1974 Mad. 14.

that they were not liable because the debt was avyāvahārika. The Court agreed that the debt was avyāvahārika. However, it held that though the sons were not personally liable, if they had inherited any property from their father, the decree could be executed to the extent of the value of that property.[1] In order to avoid any confusion that might follow from the wording of this judgement, it may first be pointed out that at present the son's liability under pious obligation itself is to the extent of any property that has come to his hand. Hence, there would be no question of his being held personally liable for any of his father's debt. Further, the nature of the property referred to in the decision is not clear. However, it may be said in this respect that if it were ancestral property, then it would not be liable in the hands of the son. For, if the father's debt was avyāvahārika, then the ancestral property would not be liable at all for such debt; but, if it were the self-acquired estate of the father, the judgement would seem to be correct.

In view of the fact that there has been difference of opinion amongst the Courts as regards the nature of the liability arising out of the father's misappropriation, it might be appropriate to postpone our conclusion until the cases involving so-called 'civil liability' are discussed.

(ii) Cases of misappropriation where the father's liability has been treated as a breach of trust or civil duty:

In most of the following cases the father would seem to have possessed another's property, in the first place, in his capacity as a trustee, agent, manager or servant and then misappropriated or ruined it.

Thus, in Jettyapa v. Laximaya[2] (1883) a decree was passed against the plaintiff's father, holding him liable personally for the sum mentioned in it, for cash and securities

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1. Ibid., at p.16, c.2.
2. Unreported Printed Judgements of the High Court of Bombay, vol.5, (1881-83) p.579. (Originally, Bom.H.C.P.J.1883, p.87).

in his possession belonging to the family which he failed to produce for the purpose of partition between himself and the other members of the family. Upon the son's objection, the Court declared that in acting as the plaintiff's father did, he has offended against the express injunctions[1] of Hindu law.

> "The pious obligation of the son to pay his father's debts is confined to debts contracted for moral purposes, and cannot, therefore, we think, extend to a pecuniary liability arising out of such circumstances as the above."[2]

The son's share was, therefore, freed from the liability. It may respectfully be submitted that the injunctions of Hindu law referred to above would seem to have been misunderstood; for, according to them, the son would have been liable in this case (see above p. 241).

In Natasayyan v. Ponnusami[3] (1892) a decree was passed against the father for money collected on behalf of the plaintiff's family but dishonestly retained by him. After the death of the father, his sons had objected on the ground that the liability was illegal and immoral. However, the Court found that the judgement-debt was not an illegal or immoral debt, and the sons were liable.

As regards the nature of the debt in this case, without going into the exact meaning of the terms 'immoral' or 'illegal' the Court said,

> "It seems to us that there can be no question that debts of the nature of those found by the decree against defendants' father to be justly due by him to plaintiff are not of an immoral or illegal nature, upon any reasonable view of

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1. For a detailed discussion of these rules, see above p.241.
2. Cit.above, at p.581. Cf. Hemraj v.Khemchand, see above, p. 232 ff.
3. (1893) I.L.R. 16 Mad. 99. It may be noted here that in certain cases the name 'Natasayyan' has been spelled as 'Natesayyan'.

> the meaning of those words as used in the rule of Hindu law under consideration. That rule, as we understand it, is that sons are under a pious obligation to discharge the just debts of their fahter because otherwise he would be liable to be punished in a future state for non-discharge of these debts. Upon any intelligible principle of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-discharge of which punishment in future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained."[1] (My emphasis).

The decision would seem to be just; but the statement would not seem to interpret the Hindu law correctly, for every debt that is justly due would not necessarily be a debt not tainted with illegality or immorality. Moreover, it might be correct, in the context of the facts of this case, that the sons were bound to do that which their father himself would have done; but as a general principle of law, it would apparently conflict with Hindu law on the subject. For, even if the father would be liable for all his debts and would be bound to repay, his sons could not legally be compelled to repay his avyāvahārika debts under Hindu law (see above pp. 238-39).

The decision in the above case was followed in Kanemar v. Krishna Chariya[2] (1908). In this case, the father had misappropriated money received by him for the purpose of being paid to others in the course of a transaction entered into by him for the benefit of the family. In the opinion of the Court the father's act amounted to a mere breach of civil duty[3] and not a criminal act, and therefore, the son's interest in the joint family property was held to be liable.

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1. Ibid., p.104. We have already discussed and criticized the principle laid down in this decision (see above pp.238-39).
2. (1908) I.L.R. 31 Mad. 161.
3. Ibid., at p.162.

In Erasala Gurunatham Chetty v. A. Raghavalu Chetty[1] (1908) the father, who was administrator of a certain estate, was made liable in respect of money received by him, as the administrator, and not properly accounted for. The sons' contention was that their father's act amounted to criminal breach of trust, and therefore the debt, being illegal and immoral, was not binding on them. However, in the opinion of the Court, the evidence in the present case was not sufficient to warrant them to hold that the failure by the father to account as an administrator amounted to a criminal offence.[2] Hence the sons were held liable.

In Venugopal Naidu v. A. Ramanadhan Chetty[3] (1914) the father incurred liability as the trustee of a temple. Certain funds of the temple were improperly expended, and therefore, the Court had directed all the trustees to reimburse the temple of that amount out of their private funds. The debt was not held to be avyāvahārika. The Court held, "Imprudent and even 'unconscionably' imprudent debts of the father are not, in my opinion, immoral, illegal or avyāvahārika debts".[4] Hence, the sons were liable. We have already made certain observations on imprudent debts (see above p. 277), however, in view of the facts of the case, one would agree with the decision. This was a case not of misappropriation but misuse of the temple-funds.

In Hari Singh v. Sant Prosad Singh[5] (1917) the father and the plaintiff bought a property at a revenue sale but, the sale having been reversed, the father withdrew the whole of the purchase-money from the Collectorate. In a suit by the plaintiff to recover his share of the purchase-money a decree was passed against the father in execution of which ancestral property was sold. The son then brought a suit to

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1. (1908) I.L.R. 31 Mad. 472.
2. Ibid., at p.474.
3. A.I.R. 1914 Mad. 654.
4. Ibid., p.655, c.2. Natasayyan v. Ponnusami was followed in this case.
5. A.I.R. 1917 Cal. 495.

recover his half share of the property on the ground that the debt was an immoral debt for which he was not liable. However, in the opinion of the Court, the father's act of drawing out money from the Collectorate was not immoral, nor did it amount to criminal misappropriation. The son was, therefore, held liable.

In Garuda Sanyasayya v. Nerella Murthenna[1] (1918) the son's liability was in issue for amounts collected by his father as trustee and misappropriated by him. It was argued in his behalf that his father must be deemed to have criminally misappropriated the funds, which were applied to his own use. In the opinion of the Court, however, the son was accountable for the debt, because it was not avyāvahārika. In this connection, the Court said,

> "It was the duty of the trustees to collect the income and their subsequent misappropriation of it does not affect the liability to account which they incurred by reason of the collection. The fact that the misappropriation amounted to a criminal offence appears to be irrelevant."[2] (My emphasis).

Thus, it would appear that the Court made distinction between the time of incurring the liability and that of committing the offence. In other words, when the liability arose it was civil and not immoral, and subsequent misappropriation would not change its nature.

In Hanmant Kashinath v. Ganesh Annaji[3] (1918) the facts were similar to that of the above case in that the father was held liable for breach of civil duty as a trustee and his sons had objected on the ground that the debt was avyāvahārika. But the Court rejected the contention on the ground that the money not accounted for by the father was not found to have been criminally misappropriated. The sons were held liable.

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1. (1918) 35 M.L.J. 661.
2. Ibid., at p. 663.
3. (1918) I.L.R. 43 Bom. 612.

In Gursarn Das v. Mohan Lal[1] (1922) the father had misappropriated a large sum of money while acting as the manager of the plaintiff's estate, and in consequence a decree was subsequently passed against him for such sums of money as he was not able to account for. Although it was urged that his son was not liable under pious obligation for such debts of the father, in the absence of any evidence to show that the debt was immoral or illegal, the Court held that the son was liable. The Court said,

> "Admittedly the father was not criminally prosecuted, and the suit was one for accounts which he had failed to deliver. Every breach of civil liability does not necessarily involve a moral turpitude, and in the present case we have no hesitation in holding that it has not been shown that the debt in question was immoral in law for the discharge of which the son was not liable."[2] (My emphasis).

It would seem to be a good decision for it has correctly laid down why every civil liability could not necessarily be avyāvahārika.

The case of N. Venkatakrishnayya v. Kundurthi Byragi[3] (1926) was similar to that of Garuda v. Nerella, (discussed above p. 379) and was decided in the same manner. The son was held liable.

In Brijnath Shargha v. Lakshmi Narain[4] (1932) the father was entrusted by his brother with certain jewellery and gold coins for safe custody. A large number of articles were found to be missing, for the recovery of which he was sued. The father died during pendency of the suit. His son was held liable, because in the opinion of the Court the debt was not avyāvahārika. According to the Court, the father's act was

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1. (1922) I.L.R. 4 Lah. 93.
2. Ibid., at p. 98.
3. (1926) 50 M.L.J. 353.
4. (1933) I.L.R. 8 Luck. 35. Cf. Surji Sethani v. Ratanlal Chamria (see above p.374). It may be noted here that, though the facts of these two cases were similar, the decisions were altogether different. In Surji's case the debts were held to be avyāvahārika.

clearly a breach of trust, and any loss that resulted to the depositor had to be made good by the father. The duty to make good the loss being highly moral and lawful, the debt was held to be vyāvahārika. This principle, though good law in view of the facts of this case, could be criticized on the same ground as the principle of general morality laid down in the case of Natesayyan v. Ponnusami has been criticized above, see pp. 238-39, for it does not correctly interpret Hindu law in respect of the son's liability.

In Govindprasad v. Raghunathprasad[1] (1938) it was found that the father was, along with others, in possession of another's property, most of which was spent in criminal proceedings and in litigation in order to deprive the rightful owner of his property. There was, however, no evidence as to whether the father could have been prosecuted criminally in respect of his possession of this property. He was neither in the capacity of a trustee nor an agent of the rightful owner. His son contended that the liability incurred by the father was avyāvahārika, and therefore he was not bound to pay under Hindu law.

In view of the facts, the Full Bench held that the liability was essentially dishonest in character, and incurred for a dishonest purpose and, therefore, it was avyāvahārika.[2] As regards the scope of the term avyāvahārika, Wassoodew, J., observed,

> "In my opinion there is no warrant for restricting its application to criminal acts of the father. The word, according to my interpretation of the text, is used in a comprehensive sense and there is nothing to fetter the discretion of the Court in applying a proper standard of morality, legality or honesty in deciding the question of the son's liability. In fact no better or more elastic formula can be devised in the application of the rule to the circumstances of each case."[3]

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1. (1938) 41 Bom. L.R. 589 or I.L.R. 1939 Bom. 533.
2. Ibid., at p. 544, (per Beaumont, C.J.).
3. Ibid., at p.550. "To exempt the son from liability, the father's act which gave rise to the debt need not be necessarily criminal." per Lokur, J., ibid., at p.554.

In the circumstances of this case the decision would seem to be correct. For, unlike most of the cases discussed in this section, the father's act was in its inception dishonest and immoral, and so was the purpose of his act. Thus, looked at from all angles, the liability would seem to be avyāvahārika. Also, in view of this decision it might be correct to say that while determining the son's liability in such cases, the Courts should look into not only the nature of the father's civil or criminal act, but also that of the purpose for which he committed the act.[1]

In Hiradas v. Jagannath[2] (1945) where the father, who was the mortgagor, had rendered himself civilly liable by removing certain materials from the mortgaged property, the Court said, "It is impossible to lay down any hard and fast rule to determine whether a particular debt is avyāvahārika, and the matter must be viewed in a broad and non-technical spirit."[3] The father's act was held to be merely a civil wrong, and a decree passed against him was therefore held to be binding on the son, because in the opinion of the Court the debt was not avyāvahārika.

In Jakati v. Borkar[4] (1959) the father was the managing director of a Co-operative Bank, which went into liquidation. He was later charged and a decree was passed against him for breach of trust. A certain bungalow belonging to the joint family was attached and sold. His sons alleged that the debt was avyāvahārika and therefore their share in the joint family property was not liable for the debt.

After referring to the decision in Toshanpal's case (see above p. 374) and while giving the judgement against the sons, the Supreme Court said,

> "The managing director of a Bank of the position of defendant No.1, who should have been more

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1. We have already made this suggestion above at p.231 after having discussed the rules concerning civil or criminal element in such acts of the father.
2. A.I.R. 1945 Nag. 294.
3. Ibid., at p. 295.
4. A.I.R. 1959 S.C. 282.

> vigilant in investing the monies of the Bank cannot be said to have incurred the liability for 'a cause repugnant to good morals'. We are unable to subscribe to the proposition that in the modern age with its complex institutions as Banks and Joint Stock Companies governed by many technicalities and complex systems of laws the liability such as has arisen in the present case could be called Avyāvahārika."[1]

The debt was therefore binding on the sons.

The liability of the father here, which arose out of his negligence, would seem to have assimilated with that which arose from the father's misappropriation in the case of Toshanpal. The fathers in both the cases were paid employees of the institutions concerned, and their acts resulted in loss to those institutions, but there ended the similarity. The acts which casued the loss were hardly similar in nature, for 'negligence in the discharge of one's duty' and 'misappropriation of funds' while in the service of an institution could hardly be called similar. The construction placed upon the nature of the liability would seem, therefore, to be strained. Besides, the reference to the modern age with its complexities, though welcome, because it took cognisance of the present circumstances, would seem to require some explanation as to how such negligence could be construed as vyāvahārika or avyāvahārika in the complex circumstances of the modern institutions.

In Sitaram v. Tarachand[2] (1962) a suit was brought against the father for recovery of certain ornaments, which were kept in custody of the father. He failed to return them, and, therefore, a money decree was passed against him. His sons alleged that the debt was avyāvahārika, but the Court held that the failure to return the ornaments created a civil

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1. Ibid., at p.286, c.2; also see "The liability of a father, who is a managing director and who draws a salary or a remuneration, incurred as a result of negligence in the discharge of his duties is not an Avyāvahārika debt as it cannot be termed as 'repugnant to good morals." Ibid.,p.291,c.2.
2. A.I.R. 1962 Raj. 136.

liability because the obligation continued to subsist even after the subsequent intention of keeping the ornaments became dishonest, and therefore the sons' objection could not be sustained on the ground of avyāvahārika or immoral debt. In other words, the debt was held to be vyāvahārika and hence binding on the sons. The view taken of the father's liability in this decision would seem to have been based on a sounder basis than those in other two cases[1] discussed above.

In the case of Venkateswara Temple v. B. Radhakrishna[2] (1963) the father, as a trustee of the temple, had lawfully collected money belonging to the temple, but subsequently he failed to account for the same. For the recovery of the amount, he was sued along with his sons. The sons' defence was that, as they were not benefited by these amounts and as their father might have used the money for his own illegal purposes, they were not liable to discharge the debt from out of the family properties. However, the sons failed to prove that the debt was either immoral or illegal and hence they were held liable to pay the debt. In the opinion of the Court,[3] the debt had a lawful origin and the criminality consisting in the misappropriation was a subsequent event. That being so the debt would not be converted into avyāvahārika

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1. Brijnath Shargha v. Lakshmi Narain, (discussed above at pp.380-81; and Surji Sethani v. Ratilal Chamria, (discussed above at pp. 374-375. Also in Sitaram v. Radha Bai, A.I.R. 1968 S.C. 534, the father was entrusted with valuable ornaments for safe custody. After his death, his sons denied liability. However, they were held liable. Misappropriation on the part of the late father was not proved. The contention would seem to have been a false plea on the part of the sons.
2. A.I.R. 1963 A.P. 425, (F.B.).
3. For a meaningful criticism of its opinion, see J.D.M.Derrett, C.M.H.L., cit. above, pp. 104-105; also see below p. 392.

debt.[1] The Court came to this conclusion after discussing a number of decisions of various Courts. In the words of the Court,

> "A son could claim immunity only where the debt in its origin was immoral by reason of the money having been obtained by the commission of an offence, but not where the father came by the money lawfully but subsequently misappropriated it. It is only in the former case that the debt answers the description of an avyāvahārika debt. If originally the taking was not immoral, i.e., if it did not have a corrupt beginning or founded upon fraud, it could not be characterised as an avyāvahārika debt and the son could not be exempted from satisfying that debt. The supervening event namely, the misappropriation later on would not change the nature of the debt. The vices should be inherent in the debt itself."[2]

In view of the facts and the circumstances of the case, this view would seem to be correct, but as a general rule it might come in conflict with the basic principles of Hindu law as observed above (see p. 226).

The above decision would seem to have been followed in the case of Loganathan v. P. Naicker[3] (1969). Here the material facts were that the father had incurred liability due to his failure to account for the income and profits from the properties, the management of which he had undertaken for the benefit of their rightful owners who were his relatives and were minors. It was alleged that the father had applied the money for improvement of his own family property. In the opinion of the Court, the liability was a civil liability to account. The origin of the liability was not repugnant to good morals, and therefore, it was not a avyāvahārika debt. The father's later failure to account might be dishonest, but that could not alter the original character of the obligation and make it criminal even initially. In these circumstances, the Court held the son liable for the debt.

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1. Ibid., at p. 429, c.1.
2. Ibid., at p. 427, c.2.
3. A.I.R. 1969 Mad. 15; see p. 20, c.2.

As in the previous case, the decision would seem to be just and in keeping with the prevailing trend of the decisions of various Courts in respect of such debts of the father. However, it may be said that the rather excessive emphasis placed upon the rule that the original character of the liability could not afterwards be altered would seem to be incorrect, for it might be that in the context of different facts the original nature of the debt would be changed, e.g., supposing that the father in the present case had in fact spent the money on liquor or prostitutes, according to Hindu law, imputing the purpose, which would relate back, the debt would have been immoral, and therefore, avyāvahārika; and hence, so far as the son's liability is concerned, the rule would have no application.

The cases discussed so far were in respect of the father's debt which arose out of his breach of trust. But now, we will turn to the cases in which the father had incurred liability due to his breach of civil duty as a servant or an agent. In substance the liability in these cases would seem to be similar to the liability arising out of a breach of trust, and, as will be seen presently, the Courts have in fact treated it in a similar way.

Thus, in Shah Wajed Hossein v. Baboo Nanku Singh[1] (1876) the father, as the agent of his principal, leased to a third person certain property of his principal without his authority. Later, as a result of the principal's repudiation of the transaction, the father incurred liability and to meet the same, he had mortgaged joint family property. The mortgagee obtained a decree against the father, but his son challenged the sale in execution of the decree, on the ground that the

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1. (1876) 25 Suth. W.R. 311. In Jai Kumar v. Gauri Nath, (1906) I.L.R. 28 All. 718, the father, as an assistant treasurer of a Bank, incurred certain liability to his superior. The son contended that the liability was for stifling a prosecution and therefore not binding on him, but he failed and was held liable.

debt was immoral. It was argued on behalf of the son that the debt might be immoral either in respect of the object for which it was contracted (i.e., to meet the liability of the father's own fraud) or in respect of the means by which money was obtained. However, under the circumstances of the case, the Court held that the debt was not improperly or unreasonably incurred, and therefore, the son was liable.

In M.D. Tirumalayappa Moodelliar v. Veerabudra[1] (1909) the father had misappropriated a certain amount of money of his principal. His son denied the liability saying that the same was immoral and therefore not binding on him. However, the Court's decision was to the effect that

> "The son of a Hindu father is liable to pay debts due by the father as an agent to another. The son's liability arises at the same time as the father's, and the fact that the father subsequently misappropriated the sum or even made himself criminally liable does not alter the son's liability." [2]

One wonders whether it is true in such cases that the son's liability arises at the same time as the father's[3] and even if it is so notionally, if the father spends the money for immoral purposes, the liability would cease to exist so far as the son is concerned; for it would not bind him. However, this was not the circumstance in this case, and therefore, the decision would seem to be correct.

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1. (1909) 19 M.L.J. 759.
2. Ibid.
3. "The rule that sons, etc., are liable under the Pious Obligation as soon as a debt is incurred, ..., has developed in order to protect alienees from fraud, and, indirectly, in order to establish the credit of Hindu fathers." J.D.M. Derrett, 'Indica Pietas', cit.above, p.57. Cf. "The liability of the Hindu son to pay the debt of his father arises from the moment the father has failed to discharge his obligation" observed the Court in Narsingh Misra v.Lalji Misra (1901), I.L.R. 23 All. 206, at p. 208. In this case, the father's certain personal debts, which he had failed to repay, were involved. The sons were held liable.

In Niddha Lal v. The Collector of Bulandshahr[1] (1916) the sons were held liable for their father's debt which had arisen, as in the above case, by way of misappropriation of his master's money, which he was asked to pay to the master's creditor. The sons had contended that the father's act amounted to criminal embezzlement, but the Court found that "this was not exactly the case of criminal misappropriation of money by a person to whom it had been entrusted. It was a case of money received by an agent who had not accounted for it and had thus incurred a civil liability."[2]

In Mohanta Gadadhar v. Ganga Shyam Das[3] (1918), and Venkatacharyulu v. Mohana Panda[4] (1921), the fathers had failed to account, as an agent of their respective principals, for the amount of rent collected from the principals' tenants. In both these cases, the sons were held liable on the ground that subsequent misappropriation of the money would not affect the nature of the liability. In the first case, the Court observed,

> "It is impossible from the facts of this case to say that the circumstances disclose a criminal misappropriation on his part or that there was any dishonesty which could constitute an immoral act within the meaning of the Hindu law. Every civil debt does not necessarily involve a moral stigma."[5]

This is a good decision, for it has explained in terms of Hindu law, why the liability of the father was not immoral. It may also be noted that in the latter case the sons were held liable not only for the sums actually received by the father and for which he failed to account, but also for sums which he negligently failed to collect when it was his duty

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1. (1916) 14 A.L.J. 610.
2. Ibid., at p. 613.
3. (1918) 3 P.L.J. 533.
4. (1921) I.L.R. 44 Mad. 214.
5. (1918) 3.P.L.J. 533, at pp. 537

to collect.[1]

In Ratna Mudaliar v. Ellammal[2] (1929) the son was held liable for his father's debts which arose out of money collected, as an agent, on behalf of the mahant but not remitted to him.

Likewise, in Mahanth Shib Narain Das v. Pandey Jamuna Prasad[3] (1937) the son had to pay for his father's debts. The father was appointed to collect certain decretal amount and rents. The rents were collected but were not paid to the principal. In both these cases the Court found no criminal intention on the part of the father. The liability was, thus, considered to be civil and therefore the sons were held liable.

In A. Anandarao v. Co-operative Credit Society[4] (1941) the father had been employed as Secretary of the Society and it was his duty to collect money from its debtors. Out of his collections, he misappropriated a large amount of money. In this connection he was induced to make certain alienations of ancestral property. It was contended on behalf of his minor sons that these alienations were not binding on them, because in as much as their father misappropriated money of the Society he committed a crime, and therefore the resultant debt was not binding on them.

In view of the long line of decisions of this Court in respect of such debts, the sons were held liable. The Court

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1. (1921) I.L.R. 44 Mad. 214 at p. 216, (per Spencer, J.). Also, see Maharaj Bahadur Singh v. Basunta Kumar, (1913) 17 C.W.N. 695, which is to the same effect, and where the facts were similar to that of this case.
2. A.I.R. 1929 Mad. 792.
3. A.I.R. 1937 Pat. 220.
4. A.I.R. 1940 Mad. 828.

said,

> "Where a father has lawfully received money the fact that he misappropriates it later will not change the character of the debt and the son is liable under the pious obligation rule. Where a person receives money on behalf of another a civil liability immediately arises and the fact that the person who has received it fails in his duty to pay it over to the person entitled to it does not alter the civil character of the debt."[1]

In view of the facts of this case, the decision would seem to be correct, but once again it should be pointed out that the rule in respect of the nature of the debt would hold only in such circumstances as in this case.

The case of Mulchand v. Small Town Committee[2] (1949) would seem to be similar in that the father here received money in discharge of his duties as the treasurer of the Committee and later on he spent it upon himself. His sons were held liable on the ground that the debt was of civil character and was not tainted with immorality or illegality in its origin. In the view of the Court, the fact that the money was later misappropriated was a wholly irrelevant circumstance.[3]

Conclusion: At orthodox Hindu law, the father's liability due to theft or misappropriation as such did not make immune, it seems, the son from his liability to pay such debts of his father. This position would seem to have been in existence, even under the British administration of justice, until the middle of the last century (see above pp. 369-371). Thus, no distinction appeared between a criminal or civil liability of the father so far as the pious obligation of the son was concerned. Apparently, the modern Courts of law were responsible for the introduction of 'criminal element' in the father's act as a basis to be considered for the purpose of determining

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1. Ibid., at p. 829, c.1 & 2.
2. A.I.R. 1949 E.P. 177.
3. Ibid., at p. 181, c.2.

whether or not a particular liability of the father was 'illegal or immoral', in the context of the son's pious obligation to pay it (see above pp.371-375).

The legal position, so obtained, was affirmed by the Privy Council in the case of Toshanpal Singh v. District Judge of Agra (see above pp. 373-375). Accordingly, even if a Hindu father had robbed somebody of his property and enriched his own family, his sons could claim immunity on the ground that the liability arose out of the father's criminal act and as such was tainted with illegality or immorality; therefore it would not bind them. Consequently, his family might well be left to enjoy the ill-gotten property without any legal obligation. We have already shown the anomaly inherent in this new concept (see above pp. 228-231). The śāstras could have hardly contemplated this result when they laid down the exception in respect of the son's liability to pay his father's debts.

It was not long before the modern Courts realized the mischief created by the concept of 'criminality' introduced into the Hindu law of debt, but their hands would seem to have been tied due to the clear authority of the Privy Council referred to above. Perhaps it is out of this situation and in order to alleviate the injustice involved, that the present dichotomy between the father's criminal acts and civil acts would seem to have born. However, in view of the above discussion, it could hardly be considered to be a satisfactory solution.

The present dichotomy between (1) acts for which a criminal prosecution has been or could be launched[1] and (2) acts which

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1. See above Mahabir Prasad v. Basdeo Singh, at p.371; Pareman Dass v. Bhattu Mahton, M^cDowell & Co. v.Ragava Chetty, Jagannath Prasad v. Jugal Kishore, at pp.372-73; Bai Mani v. Usafali, Widya Wanti v. Jai Dayal, Toshanpal Singh v. District Judge of Agra, at pp.373-74; Surji Sethani v. Ratanlal Chamria, Perumal v. Devaraja, at p.374-75; cf. Garuda Sanyasayya v. Nerella Murthenna, pp. 378-380.

gave rise merely to a civil liability[1] - a dichotomy which is evidenced in textbooks[2] - is obviously unrealistic in so far as in cases coming under (1) there are wrongful acts which are not prosecuted merely because the plaintiff believes he has a better chance of recovering some or even all his money by pursuing the civil remedy by an action for unjust enrichment or conversion or the like than by commencing a criminal prosecution in the hopes that money will eventually be paid to him under sec. 357 of the Criminal Procedure Code, 1973 (formerly sec. 545 Cr.P.C. 1898, see J.D.M. Derrett, C.M.H.L., p. 104). And there are also cases where prosecution is at once opted for. It seems completely unrealistic that the sons' liability to compensate the victim should depend on the victim's option regarding the mode of pursuing his opponent.

The dichotomy which gives rise to such anomalies derives from the failure on the part of the Privy Council and, e.g., the Madras High Court, to grasp that whereas unpaid fines are tainted, it is illogical to brand sums owed on account of a wrongful act as tainted unless it is accepted philosophy amongst Hindus that sons are not to be forced to compensate the victims of their fathers' wrongdoing where the act could conceivably have been defined as a crime. An illustration will clarify the matter. A father, F, being in advanced stages of schizophrenic disturbance, turns over the barrow of a street-trader causing the trader, T, Rs. 500 worth of damage. F insists that T sells poisoned goods because he is a member of a subversive organisation. F's act will not be classified as a crime, because F is not responsible for his actions. Under our dichotomy above the sons of F are liable, because

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1. See above all the cases discussed in subsection (ii) at pp. 375-390.

2. N.R. Raghavachariar, cit.above, pp.344-345; F.D. Mulla, cit.above, pp. 351-353; J.D. Mayne, cit.above, at pp.403-405; G. Sarkar Sastri, cit. above, at p. 238; J.D.M. Derrett, I.M.H.L., cit. above, at pp.314-315; P. Diwan, cit.above, at pp. 270-271.

the act is untainted! If, however, F overturned the barrow in the course of a quarrel with T, F being sane, and intending to do T malicious damage, the act is tainted and the sons are free. But is this accepted Hindu philosophy?

If we go back to our Sanskrit sources and our attempted reconstruction of the juridical and philosophical theory on which they were based, we recollect that the mīmāṁsā concept that a man's issue, etc., are not tainted with his crimes or unrighteous behaviour, on the principle that a man's own karma must be worked out by him, so that it is only his just debts which burden his sons, etc., is responsible for the characteristic dharmaśāstra position on our subject. We recollect, however, that the mīmāṁsā position was not de facto paramount in Hindu society. Manu's text[1] gives examples of the other view, namely that dharma and adharma are, as it were, assets and liabilities which can be shared, and perhaps will be shared. Inscriptions again and again assure us that those who divert or confiscate charities will afflict with sin past and future generations. Hence the Hindu public has not been faithful to the mīmāṁsā concept: there was no reason why it should be. Mīmāṁsā is one of the intellectual sources of dharmaśāstra, but it is only one of many equally valid philosophies.

Thus, through the ages, the concept that a man's sons must share his demerit has found acceptance de facto. And these are aspects of Hinduism which cannot be ignored in the law-courts. To impose philosophical notions which the public

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1. "Daṇḍo hi sumahattejo durdharaścākṛtātmabhiḥ /
Dharmādvicalitam hanti nṛpam eva sabāndhavam // 28 //.
Manu, VII.28. Vide, G.Jha, Manusmṛti (with Bhāṣya of Madhātīthi), vo. II, (Cal.1939), p.9.
"Punishment, ... destroys the king who has swerved from duty, along with his relatives." Vide G.Jha, op.cit., trans., vol.III, pt.II, (Cal.1924), p.289. According to Medhatithi's commentary, i.e.,
"... śarīreṇa kevalena rājā naśyati, yāvatputrapautrādyanvayena saha // 28 //;
Vide G.Jha, op.cit., at p.9, i.e., "The King is struck down not only physically by himself, but along with his whole family of sons and grandsons". Vide G.Jha, trans., op.cit. at p. 290.

do not accept in practice is an error, as was recognised in the Supreme Court in the great case concerning payment of income-tax by idols (Jogendranath Naskar)[1] wherein the mīmāṁsā doctrine was fully enunciated, but rejected as inconsistent with received practice.

On this footing, fines are indeed tainted, because they are listed in the texts and not removed by legislative act. But in so far as fathers become indebted by way of compensation to their victims, whether the act is criminal or not, the Hindu public cannot regard it as moral that the sons should escape liability merely on the ground that, as Hindus, their fathers' souls should be burdened with the adharma, and they themselves should be under no obligation to compensate the victim and so liquidate the adharma. This, in the name of a mīmāṁsā doctrine, would give Hindus a privilege precisely to burden their ancestors with the full effects of an adhārmic act. Thus, compensation should never be held to be tainted, whether it is awarded under sec. 357 or in a civil suit.

This brings us to a procedural question which cannot be ignored. Much of the ambiguity of avyāvahārika arises from the fact that the ancient Hindu judicial procedure, whether as reflected in the smṛti texts and commentaries or in the surviving judicial records (e.g., mahajars in Mahārāshtra or inscriptions elsewhere) did not distinguish in principle between a civil or a criminal action, and claims which we regard as civil claims and complaints which we regard as criminal prosecutions were pursued simultaneously. It is a commonplace in the śāstra that fines, damages, and court-fees were dealt with in the same action. Our own approach to the subject is conditioned by two factors. We are aware that in the common-law system a tort cannot be pursued while

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1. Jogendranath Naskar v. Commissioner of Income-tax, A.I.R. 1969 S.C. 1089, at p. 1091, c.2, and p. 1092, c.1.

the crime disclosed by the case has not been prosecuted,[1] but the prosecution of the crime does not end the victim's claim in tort.[2] In the ancient Roman law it seems to have

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1. Reference may be had in this regard to F.Pollock & F.W.Maitland, The History of English law, 2nd edn., vol.ii, (Cambridge, 1911), pp. 572-573; F.W. Maitland, Equity, (Cambridge, 1920), p. 258 ff; see particularly, pp.261-262; H.G. Hanbury, Modern Equity, 8th edn., (London, 1962), pp.298-300; A.K.R. Kiralfy, The English Legal System, 3rd edn., (London, 1960) pp. 12-15; Halsbury's Laws of England, 3rd edn., vol. 1, (Lodnon, 1952), pp. 11-13, para.16.

2. Halsbury's Laws of England, op.cit., pp.11-12, para.16; (cf. Halsbury's Laws of England, 3rd edn., Cummulative Supplement, (1974), vol.10, para. 548); also see, Rose v. Ford, (1937) 3 All. E.R. 359. Here one Mabel A.Rose was fatally injured, (and died after four days) in collision of a Motor Cycle and a Motor Car, driven by the respondent. In this case, at p. 371, Lord Wright said, "In any event, whatever the old law may have been, the modern law is quite clear that, if the act complained of constitutes a felony, the civil remedy is not drowned, but merely suspended."

   For earlier view reference may be made to Midland Insurance Co. v. Smith, (1881) Q.B.D. 561, in which a insured house was feloniously burnt, but the Insurance company had refused to pay on the policy. It was held that "the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law." per Watkin Williams, J. at p. 568.

   Cf. Smith v. Selwyn, (1914) 3 K.B.D. 98, where it was held that an action for damages based upon a felonious act committed against the plaintiff by the defendant is not maintainable until the latter has been prosecuted or a reasonable excuse has been given why a prosecution has not taken place, and the duty of the court in such a case is to stay the proceedings in the action until the defendant has been prosecuted.

been understood, as in India, that both aspects of a complaint could be pursued concurrently, at least in theory. In later Roman law there were several distinctions, turning upon the type of action, the chapter (as it were) of law under which the claim was brought. The Hindu concept that a debt was tainted, irrespective of whether we should define the action as a crime or not, is thus intelligible against the earliest and not the developed stages of Roman law. Western civil laws continued to develop the principle that criminal and civil rights could not be pursued in the same action, though the choice of first remedy might interfere with the opportunity to pursue an alternative. On this subject there were many views, and much obscurity, leading eventually to our present common-law solution, amongst others. The latest discussion of this area of legal history does not concern us in detail (H. Chalmers, 'The concurrence of criminal and civil actions in mediaeval law', Studia et Documenta Historiae et Iuris 39, 1973, 385-424) but it alerts us to the unreality of the hypothesis stated above, namely, that if the action from which the debt arose is criminal the sons cannot be made to pay, whereas if it is civil they may be liable. The śāstra was developed in an environment in which such distinctions would have been unintelligible.

In view of the above, therefore, we may be correct in saying that a debt such as, for example, that due to misappropriation, which neither the śāstras nor a śāstric Court would have considered as an avyāvahārika debt, should not have been considered so, in the first place, by the modern Courts. However, in order to improve upon the present anomalous legal position, the suggestion[1] that sons should not be allowed to plead, under the law of unjust enrichment,[2] that a debt was

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1. Per J.D.M. Derrett, C.M.H.L., cited above, p. 106.
2. Ibid., f.n.7 there. Besides the references given there, see also, (1955) 71 Law Quarterly Review, 254: 'In Pari Delicto Potior Est Conditio Defendentis' by J.K.Grodecki. The writer's views on 'unjust enrichment' as appeared on pp. 266-267, would seem, by analogy, to support this proposition. Also see, R.Goff and G.Jones, The Law of Restitution, (London, 1966), pp. 125 ff, particularly pp. 304-305.

tainted, when, in fact, it was utilized for meeting legitimate purposes of the family, might well be accepted; for it would deprive the sons of free enjoyment of such ill-gotten wealth by their father, and would make them liable for it. Even the śāstric point of view on the subject would seem to support the propositon.

Now speaking about the section as a whole, the cases involving mesne profits, criminal or civil misappropriation pose a peculiar problem: in these cases, as we have seen above, where the father's liability arose out of certain objectionable acts of his, if we go by the rule that the nature of the act of the father would determine the nature of the liability, then, in such cases, the son might stand to gain out of his father's certain wrongs or crimes which were inherent in the act concerned. This is likely to encourage such unlawful and immoral activity - quite contrary to the wishes of the law-givers - and the Hindu law would be utilized to protect the gains of such illegal and immoral activity of a Hindu father.

In view of this apparent anomaly, and in order to avoid injustice being done, the above rule may be amended to the effect that both the nature of the father's act and his intention in doing the act should be looked into for the purpose of determining the nature of the ensuing liability, and if both or at least the latter was found to be immoral or unrighteous, the son should be exempted, otherwise he should be held liable to pay such debts of the father (seen above pp. 225-241).

In the present circumstances, therefore, a choice must be made by the Supreme Court between two abundantly documented viewpoints: (a) where the father becomes a debtor at the moment of a grossly immoral or illegal act, the sons are not liable even where an innocent third party is put to loss - and this could happen even in Equity, (for example, see

Kennedy v. Green, discussed below at pp. 413 - 415); - and the sons may indirectly benefit financially by the act; and (b) where the father's illegality, immorality or crime succeeds, even momentarily, his civil indebtedness, the sons are liable and the third party may be compensated at their expense.

The whole problem can only be solved by asking two questions: what is the orthodox Hindu scriptural teaching on sons' liability to make good their father's debts? and (b) does this still apply under modern social, economic and legal conditions?

VI.3.3 CASES ON TIME-BARRED DEBTS

In view of the śāstric provisions,[1] which were based on spiritual and moral grounds, and according to which, not only the debtor, but also his sons, grandsons and great-grandsons were liable to pay a debt, there was hardly any scope for prescribing any period of limitation[2] so far as recovery of debts was concerned. However, the enactment of the Indian Limitation Act[3] would seem to have led to some odd doubts as to (a) whether a time-barred debt of the father would bind his sons, and (b) whether a renewal by the father of such time-barred debts could be called avyāvahārika. It seems that time-barred debts were considered avyāvahārika in the sense that their revival was not a family necessity in as much as it was against the interest of the family.

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1. Mit. on Yājñ. II.50, etc.; see above, p.34; and 31 for similar views of the other śāstrakāras; P.V.Kane, H.Dh., vol.III, cit. above, p.408.
2. For an exception, see Kaundiṇya (or Kauṭilya?) quoted in Vyavahāra-Mātṛkā; vide P.V.Kane, op.cit., at p.409, f.n. 656.
3. Since it was first enacted in 1859 (Act XIV of 1859) as repealed by Act (XV of 1877) Act (IX of 1908); and the new Indian Limitation Act of 1963. For its introduction and early development, see T.B. Sapru, ed., Encyclopaedia of General Acts and Codes of India, pp. 245-246.

The answer to both these questions was given in the case of Narayanasami v. Samidas Mudali[1] (1883) in the following words:

> "The fact that the debt was barred by the Act of Limitation did not affect the existence of the debt, and there was nothing illegal or immoral in the action of the father in promising to pay it. The new note operated as a renewal of the obligation. It was a good debt and the son is bound to pay it from any assets of his father."[2]

Thus, the effect of the Act was to debar the creditor's remedy, but if the father renewed his barred debt, it was neither illegal nor immoral and was binding on the son. The father had renewed his barred-debt in this case, but what if the father had not renewed such a debt of his and died?

In the case of Hiralal Marwari v. Chandrabali Haldarin[3] (1908) a surety liability of the father, which was not followed within the period of time allowed, was held to be not binding on the son, on the ground that the remedy against the personal liability of the father was lost, and therefore the creditor could not pursue his claim against the son. For the remedy which was not available against the father could not avail against his son or his family property.

In the case of Subramania Aiyar v. Gopala Aiyar[4] (1909) the liability of the father arose out of his failure to collect certain rents (due to a temple of which he was a trustee), which were lost to the temple because the father had allowed them to become barred. After the father's death his sons were sued for the recovery of the amount in question.

In this case the sons were held to be not liable to pay the debt of the father which was barred against him. However, the debt, the recovery of which was barred by limitation, was held to be not extinguished and that the debtor was not,

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1. (1883) I.L.R. 6 Mad. 293.
2. Ibid., at p. 294.
3. (1908) 13 C.W.N. 9.
4. (1910) I.L.R. 33 Mad. 308.

by reason of the bar of limitation, discharged therefrom. In this regard the Court observed,

> "There is hardly any room for doubt in the face of the express language of the section 28 of the Indian Limitation Act, XV of 1877, which merely extinguishes the right to property when the period is determined for suits for recovery of such property. Whenever personal actions are barred, the rights themselves are not extinguised. That the principal debtor is not discharged by lapse of time may also be gathered from section 25, clause 3, and section 60 of the Indian Contract Act, IV of 1872. A barred debt is a good foundation for a written promise to pay signed by the party liable to be charged therewith. It is impossible to regard a debt as discharged by limitation when section 60 of the Indian Contract Act, speaks of a barred debt as a lawful debt, actually due and payable to the creditor. Unless the law of the limitation operates as well as a law of extinctive prescription, omission to sue cannot discharge the debtor. Limitation which merely bars the remedy is never spoken of in works of Jurisprudence as a mode of discharging an obligation."[1]

If this were the case then in view of Hindu law how could the son be relieved of his liability under the doctrine of Pious Obligation? In connection with the Pious Obligation, it was observed, obiter, "The Hindu Law makes no difference between a time-barred debt and a debt which is not so barred."[2] However, the statutary provision would, in effect, amount to relieving the son despite the fact that his father's debt would still be in existence. In view of this decision, therefore, it may be said that

> "a further restriction has now been introduced by the law of limitation. A son is not liable for the payment of a debt due by his father, if it was not legally recoverable from him had

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1. Ibid., at pp. 310-311.

2. See Sheo Ram Pande v. Sheo Ratan Pande (1921), 63 I.C. 279, at p. 280, c.1. In this case a mother succeeded to son's property and had alienated it to pay her husband's debts which were time-barred, and which were not charged on the property. Held that the alienation was not binding.

he been alive."[1]

Thus, due to the operation of the Act, a situation seems to have arisen in which, because the creditor would be barred from pursuing his remedy, the Hindu father as well as his sons might well be encouraged in such a situation to disregard their spiritual, moral and legal duty to repay all just debts.

However, as regards the validity and nature of the revived time-barred debt of the father, there arose certain differences of opinion even within the same High Court, for example, in Indar Singh v. Sarju Singh[2] (1911) and Dalip Singh v. Kundan Lal[3] (1913), the Allahabad High Court held that the father could not legally revive a time-barred debt and bind the family property to secure its repayment, for to revive a time-barred debt was not a family necessity in-as-much as it was against the interest of the family to revive such debts.[4] Clearly the law contemplated here is Hindu law. However, it would seem to have been construed in contravention of its spirit. For, to construe a renewal of a just debt, even if it was time-barred, as against the interest of the family, would seem to go against the most fundamental principle

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1. See Gajadhar v. Jagannath (1924), 80 I.C.684 (F.B.), at 687, c.1. This case raised the question whether a time-barred debt can constitute antecedent debt for the purpose of supporting an alienation by the father of a joint Hindu family. (Also see below p. 402).
   Also see "The pious obligation of the son does not extend to the payment of his father's time-barred debts. If the debts could not have been enforced against the father, were he alive, the son is not bound." per Dowson Miller, C.J., see Achutanand Jha v. Surajnarain Jha, (1926) I.L.R. 5 Pat. 746, at pp. 753-754. In this case, elder brother's alienation of ancestral property made in connection with a mortgage-deed, executed by his father to secure his personal debt, was challenged on the ground of lack of necessity. The father's personal debt was time-barred at the time of the elder brother's alienation. The Court upheld the alienation on the basis of the mortgage.
2. (1911) 8 A.L.J. 1099.
3. (1913) 11 A.L.J. 244.
4. Ibid., see pp.246-247. The decision in Naro Gopal v.Paragonda (1917) 19 Bom. L.R. 69 is on the similar line where an adult son was not held liable for the father's alienation in respect of his time-barred debts.

of Hindu law: the father's just debt must be repaid at the cost of the family estate. But these decisions were not followed in Ram Kishan Rai v. Chhedi Rai[1] (1922), where, following Narayanasami's case, such alienation of the father was considered to be legal and binding on the son after his death. This conflict of decisions was resolved by the Full Bench in Gajadhar v. Jagannath[2] (1924). The first two decisions were overruled, and the third was approved after a thorough discussion of the case-law on the subject. The Court held,

> "A promise to pay a barred debt is in fact neither illegal nor immoral and a son cannot escape liability merely because the debt which his father had agreed in writing to pay, was one, the payment of which he could have legally avoided."[3]

Moreover, it went on to lay down that "A debt revived by the father cannot be regarded as an avyāvahārika debt, or a debt not recognized by law or usage either under Hindu law or under the law now in force."[4]

This decision has since been followed in Jagdambika Prasad Singh v. Kali Singh[5] (1930), Parmanand v. Gurprasad[6] (1935) and Gangadhar Patra v. Dolgovinda Sahu[7] (1956) and there appears to be hardly any doubt now as regards the nature of a revived time-barred debt of the father.

In conclusion it may be said that although a debt of the father might become irrecoverable under the law now in force by reason of the lapse of the period of limitation, the

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1. (1922) 68 I.A. 235.
2. (1924) 80 I.C. 684, (F.B.)
3. Per Kanhaiya Lal, J., ibid., at p.688, c.1.
4. Ibid., at c.2.
5. (1930) I.L.R. 9 Pat. 843, at p. 849.
6. (1935) I.L.R. 11 Luck. 393, at p. 395.
7. A.I.R. 1956 Or. 193, in c.2. The material facts of these three cases were similar, and the debts were held to be binding on the sons.

debt would exist all the same. But the creditor would not be able to call upon the son's pious obligation unless the fahter revived[1] his time-barred debt. Once revived, the debt would be binding on the son because mere renewal could not make a just debt into an avyāvahārika debt.

VI.4 MODERN UNCERTAINTIES CONCERNING THE CONCEPT OF AVYĀVAHĀRIKA DEBTS

The above discussion of the case-law concerning the definition and scope of the concept of avyāvahārika has abundantly exposed the fact that in spite of their efforts, the modern Courts have failed to ascertain or arrive at the law on the subject. This is evident from the fact that, even after a number of attempts made at defining the term avyāvahārika by the High Courts, the Supreme Court and the Privy Council, the exercise is still on.[2] As regards its scope the position appears to be even worse in that, on the one hand, they have refused to treat certain debts of the father as avyāvahārika which according to the śāstras would seem to have been so treated, (see above p. 308 ff), but on the other hand, they have introduced new categories which the śāstras or orthodox Hindu Courts would not have considered avyāvahārika debts, i.e., criminal or civil misappropriation (see above pp.390-397).

Moreover, as the socio-economic structure of the society has undergone a considerable change, the ideas as to what constitutes an avyāvahārika act or a tainted debt seem to

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1. "The exception in favour of debts revived by the father ... are really exceptions proving the rule." J.D.M.Derrett, 'India Pietas', cit.above, at p. 57; see also f.n. 52 there, for the reasoning behind the rule.

2. See for example, M.Veera Raghaviah v.M.China Veeriah, A.I.R. 1975 A.P. 350, at p.355; also see above f.n.1 at p. 254; Sridharan v. Murthi Brothers, (1976) 1 M.L.J.100 at p. 102.

have been affected too. Though welcome, these ideas have a certain unsettling effect upon the law; for, according to them, 'gambling' debts could not be construed as being of the same nature as the debts due to 'speculation in stocks and shares',[1] as the latter has become one of the legitimate ways of earning one's living; or, the actions of managing directors of modern institutions such as banks and cooperative societies could hardly be viewed without reference to many technicalities and complex laws which govern the working of such institutions.[2] However, the Courts have not devised a clear-cut method or laid down any principles by which the actions concerned could be properly judged, and therefore a certain amount of ambiguity has been injected into or at least suffered in the law concerning avyāvahārika debts.

In addition, the mental attitude of the judges in dealing with the cases on the subject, the difference between the ancient Hindu juridical rules and the modern rules of procedure (see above pp.394-396), the difference of opinion existing among the Courts as regards the degree of evidence required for the purpose of determining whether or not a particular debt is 'tainted', may be mentioned as sources contributory to modern uncertainty concerning the concept of avyāvahārika.

Finally, misapplication or undue extention of judicial rules designed to ascertain and stabilise the law, such as 'precedents', 'stare decicis' etc., have instead led, it seems, to the present confusion. The decision in Luhar Amritlal v. Doshi Jayantilal[3] may be cited as an example of this.

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1. Doshi Jayantilal v. Luhar Amritlal, A.I.R. 1954, Saurashtra 36, at p. 38, c.1.; also see above pp.322-23; Gulabchand Jethabhai v. Vadilal Sarabhai, A.I.R. 1950 Kutch 78, at p. 79, c.2; also see above pp.321-22.
2. Jakati v. Borkar, A.I.R. 1959 S.C. 282, at p.286, c.2; also see above pp.382-83.
3. A.I.R. 1960 S.C. 964

The Supreme Court's decision amounts to this: that sons are not liable to pay their father's avyāvahārika debt,[1] but where ancestral property has been alienated to pay an antecedent debt of their father, the sons who challenge the alienation have to prove not only that the antecedent debt was immoral but also that the alienee had notice that it was so tainted.[2] In this case the debt was found to be tainted, but because the sons could not prove the alienee's knowledge of the taint, the decision went against them. Apparently this is contrary to Hindu law, and cannot be defended under the doctrine of pious obligation. For, according to Hindu law - the śāstras - the son is not liable if the father's debt is avyāvahārika; and not if his creditor or alienee knew that it was avyāvahārika. Why then should the Supreme Court uphold such a rule and thereby subject the son to the additional burden of proof? We shall deal with this problem in the following chapter. Suffice it to say here that the rule has reference to the doctrine of 'bona fide lender or purchaser', and therefore the Supreme Court felt obliged to hold so, in view of 'precedents' and the rule of 'stare decisis'.[3] It should be noted that the doctrine was picked up straight from the English law of trusts and introduced[4] to Hindu law by the Privy Council in the case of Hanoomanpersaud Panday;[5] and holding the son liable under this rule alone, particularly when the debt was 'tainted', would seem to confuse the already unsettled legal position of the doctrine avyāvahārika.

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1. Ibid., at p. 966, c.2.
2. Ibid., at p. 971, c.2.
3. Ibid., at pp. 970-71; also see, J.D.M.Derrett, at (1964) 10 Lucknow Law Journal, cit.above, at p.2.
4. J.D.M. Derrett, C.M.H.L., cited above, p. 427. Also see above, pp.198-99.
5. (1856) 6 M.I.A. 393, at p. 423

Admittedly a certain amount of flexibility is implicit in the concept of avyāvahārika, because it is intended to be of general application to various sets of facts. However, in conclusion, it must be stated that the Supreme Court's ruling makes still more deplorable the degree of uncertainty regarding the limits of 'taint'.[1]

However, before suggesting our remedies, we must investigate in some detail the question of notice of taint, and see whether or not the son should be burdened with the onus of proving the creditor's, etc., knowledge in order to escape his liability under Hindu law.

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1. J.D.M. Derrett, I.M.H.L., cited above, p. 313, sec. 508.

CHAPTER VII

THE QUESTION OF 'NOTICE OF TAINT'

VII.1 General

VII.2 The Origin of the doctrine of 'Notice'

VII.3 Its meaning and scope
- (i) Actual notice
- (ii) Constructive notice

VII.4 Its proper place in Modern Hindu Law

VII.1 GENERAL

We have already referred above (see p. 200) to the doctrine of bona fide purchaser for value without notice of defects in the alienor's powers, and also have noticed that this doctrine was taken[1] straight from the English law of trusts and introduced to Hindu law by the Privy Council.[2] Obviously, with the entry of this doctrine, the doctrine of notice entered into Hindu law, for it is part and parcel of the former. We might be in better position to ascertain its proper place in modern Hindu law if we investigate, in short, its origin, meaning and scope as it was understood in the English law of trusts at the time of its entry into Hindu law, that is c. 1856.

VII.2 THE ORIGIN OF THE DOCTRINE OF NOTICE

It may be said with some accuracy in respect of the genesis of the doctrine of notice that the Roman Civil law contained germs of the doctrine. For it is there, it is stated, that a creditor, who knowingly or dishonestly allowed his debtor to sell the property which was mortgaged to him, would be deprived of his pledge.[3] However, this result was not possible unless the purchaser proved that there were circumstances showing that the creditor knew what was happening in respect of his pledge, and acted disingenuously and dishonestly while the alienation took place.[4]

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1. J.D.M. Derrett, C.M.H.L., cit.above, at p.427.
2. In the case of Hanoomanpersaud Panday, (1856) 6 M.I.A.393, at p. 423; also see above p. 200, f.n.1.
3. J. Domat, The Civil Law in its natural order, Book III, tit.1, sec. 1, art. 33; vide W.Strahan, trans.; vol.I, (Boston, 1850), pp.661-62.
4. J.Domat, op.cit.,Bk.III,tit. 1, s.7, art.15; and the translator's note, pp. 704-06; also see, J.Story, cit.above, at pp. 254-55.

Now, W.S. Holdsworth has, in his History of English law, shown[1] how reception of Roman law occurred during the 16th and 17th centuries. Concerning the rule that the former owner cannot recover at all from the bona fide purchaser, he has stated that

> "The canonist view of the importance of good faith, which did so much for the development of commercial contracts, led to the adoption of the rule that it was only the bona fide purchaser in a market who could claim this privilege."[2]

Thus, it would appear that the doctrine was initially received on considerations of good conscience, or, as we say, 'justice, equity and good conscience'. By 1628 the Star Chamber, in order to prevent frauds upon creditors and purchasers declared,

> "that if any man do make conveyances of his land, or acknowledge Statutes or Recognizances or suffer judgements, whether the same be upon just and good consideration or without, and concealing the same do afterwards for valuable consideration convey the same lands to other persons, as though the same were free from any manner of incumbrance; such double and unjust dealing is a notorious fraud and deceit against the law of the realm, and fit for censure of this court; and albeit such former conveyances and incumbrances, if they be upon good consideration and bona fide, cannot be avoided; yet this court will upon complaint punish the offenders and their confederates by imprisonment, fine and damages to the party grieved, to the full of his loss and hinderances and otherwise, as the cause shall require."[3]

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1. W.S.Holdsworth, A History of English Law, vol.IV, (London, 1923), pp. 228 ff; see particularly pp. 239 and 245.

2. Ibid., vol.V, (London, 1924), p.99; cf. Good faith or "Bona fides is not identical with the modern 'good faith'... although it served as a model for this. Mala fides was in most cases present when the acquirer knew the facts which hindered his acquiring ownership, e.g., the non-ownership of the transferor." Vide M.Kaser's translation, cit.above, at p.107.

3. Ibid., at p.213; cf. Roman law in respect of 'Fraud on creditors', vide, M. Kaser, cit.above, at p.52 where transactions made in good faith etc. are dealt with in brief.

In justice, protection from fraud and deceit for bona fide creditor or alienee of the debtor was necessary, and the application of the rule to such cases would seem to be a just and logical extension.

In the course of professional development of English law, equity would seem to have recognised new forms of property, which led it to treat as property, it is stated,[1] not only such things as the rights of the cestui que trust to the trust property, and rights to stock and shares, but also rights under a contract or covenant. These were compendiously called choses in action. Anything which the common lawyers refused to treat as assignable property was grouped by them under this general description; and thus it included many diverse things for which equity was beginning to lay down different rules.

> "In particular, equity was beginning to lay down some definite rules for the assignment of rights under a contract. It would assist an assignee, provided he had given consideration; but he took subject to equities; and the debtor could safely pay the assignor till he had had notice of the assignment. From the first the question whether a man had had notice was of vital importance in many different branches of equity. And it is natural that this should be so. Equity acted in personam, and interfered to make the person do what he conscientiously ought to do. Hence it could not interfere with a person who had got a legal title for value and without notice of any equitable claim to the property. Naturally the question what could be regarded as notice soon became important; and by the end of this period, equity was elaborating rules as to constructive notice. In the particular case of an assignment of a right under a contract, it was clearly impossible to expect a debtor to pay any other than the original creditor, unless he had had notice of the assignment. And thus, in this connection, notice becomes all important, not as a step in the title of the assignee, but as a necessary security that the thing he has got will not be destroyed by a payment made by the debtor to the assignor."[2]

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1. W.S.Holdsworth, opp.cit., vol.VI, (London, 1924), p.667.
2. Ibid., pp.667-68.

Thus it is clear from the above that even if the genesis of the doctrine of notice could be traced back to Roman Civil Law, the doctrine, as we know it, was developed by the English law of Equity, and therefore, so far as we are concerned, it originated in equity.

VII.3 ITS MEANING AND SCOPE

As explained above, Equity interfered to make a person do what he conscientiously ought to do, and therefore, it could not interfere with a person who had got a legal title for value and without notice[1] of any equitable claim to the property. However, in order to determine whether an alienee was bona fide, it was necessary to ascertain what constituted notice.

Notice is either actual or constructive, though there is no difference between them in its consequences.[2]

(1) Actual notice is actual knowledge of the facts, but to be a binding notice, it must be given by a person interested in the property, during the treaty for the purpose.[3] In other words, vague rumours from persons not interested in the property will not affect the purchaser's conscience; nor

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1. Also, see "The want of notice, too, on the part of the purchasers, is a considerable circumstance in their favour." Vide, R.Burn, The Ecclesiastical Law, (8th edn., 1824), vol.IV, p.330.

2. "There is no difference between personal and constructive notice in its consequences," (except as to guilt). per Lord Northington, the Chancellor; in Sheldon v. Cox, (1764), Amb. 624, at p. 626. (In this case, the barrister employed knew the facts of the case, and it was held that notice to agent affects his principal.) Also, see E. Sugden, The Law of Vendors and Purchasers of Estates, 14th edn., (London, 1862), p.755.

3. Ibid., also, see G. Spence, Equitable Jurisdiction, vol.2, (Lon., 1849), p. 753.

will he be bound by notice in a previous transaction which he may have forgotten. The notice to the purchaser must therefore be in the same transaction; and a notice, in order to be binding, must proceed from some person interested in the property. Thus, by actual notice, knowledge of the facts is brought directly home to the party.[1]

(ii) Constructive notice: It has been said that

> "Constructive notice assumes that no proof is given that the party had actual notice of the fact itself; but that he is affected with notice of the fact by construction of law: the Court does not proceed upon the principle, that the facts proved must be taken as showing that the party actually had notice; there may be conclusive evidence that he had not; yet if his want of knowledge arises from negligence he will be equally affected as if he had actually had notice."[2]

In this regard, it has also been said that there may be cases in which (i) the party is fixed with having himself had notice of a particular fact, from the facts of which he is proved to have had knowledge, or (ii) there may be circumstances in which he is considered as bound by the knowledge which his attorney or agent may have acquired.[3] In the context of these principles the Courts would seem to have construed the doctrine of constructive notice.

Thus, in Plumb v. Fluitt[4] (1791) title-deeds were deposited as security for money with a creditor of the mortgagor; the defendant, another creditor of the mortgagor, fearing his immediate insolvency, took a conveyance of the same premises, without notice of the incumbrance. The mortgagor had excused himself for not bringing title-deeds to the defendant on a couple of occasions previous to execution of

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1. J.Story, Commentaries on Equity Jurisprudence, 2nd English edn., (London, 1892), p.258.
2. G.Spence, op.cit., p.754; for further details reference may be made to E.Sugden, op.cit., pp.755-784.
3. G.Spence, op.cit., p.754.
4. (1791) 2 Anst. 432.

the mortgage, and only after the execution had told the son of the defendant that the deeds were deposited as a security for debts. To succeed, the plaintiff had to prove actual or constructive notice of the deposit in the defendant. It was in this context that Eyre, C.B., said, "Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted."[1] What he meant by this definition appears to be this: that where the party has possession or knowledge of a deed under which he claims his title, and it recites another deed which shows a title in some other person; there the Court will presume him to have notice of the contents of the latter deed, and therefore will not permit him to introduce evidence to disprove it.[2]

We find perhaps a better exposition of this doctrine in the judgement of Brougham, L.C., in Kennedy v. Green[3] (1834). Here, an attorney upon a fraudulent pretence procured an assignment from his client of a mortgage which he had obtained for her and subsequently made a mortgage of the property to an innocent party, and acted (so it was decided by the Court) as solicitor for the mortgagee, who had no other solicitor. The Master of the Rolls had held that the knowledge of the solicitor of the fraud, which he himself had committed, as

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1. Ibid., at p. 438. This definition has been quoted with approval in E.Sugden, op.cit., at p. 755; J.Story, op.cit., at p. 258; G.Spence, op.cit., at p.755. In this case the decision went in favour of the defendant, for in the opinion of the court the facts proved amounted to no more than evidence of showing that there was reason for further inquiry; but which could not be construed as fraud, or gross and voluntary negligance on the part of the defendant (see, ibid., pp.439-440).
2. Ibid., at p.438; also see J.Storey, op.cit., pp.258-259. Also, see, Mertins v.Jolliffe, (1756) Amb.311, at p.314, where it was held that "And so it is in all cases where the purchaser cannot make out a title but by a deed; which leads him to another fact: the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognizant of it; for it is crassa negligentia that he sought not after it." Hewitt v.Loosemore, (1851) 3 Hare, 339, at pp.455-56, was to the same effect. The case is discussed below, see p.419.
3. (1834) 3 Myl. & Kee. 699, at p. 719.

much affected the mortgagee as if the solicitor had acquired that knowledge from a third person, but the Lord Chancellor decided otherwise. It was in the course of this judgement that his Lordship said,

> "The doctrine of constructive notice depends upon two considerations: first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge that the law holds the knowledge to exist; because it is highly improbable it should not; and next, that policy and safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge. In such a case it would be most iniquitious and most dangerous, and give shelter and encouragement to all kinds of fraud, were the Law not to consider the knowledge of one as common to both, whether it be so in fact or not. Under one or other of these heads, perhaps under both, comes the other principle, which is quite undeniable, that whatever is notice enough to excite attention, and put the party on his guard and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation." [1] (My emphasis).

The term 'whatever' in this context would seem to mean a certain knowledge about the property in dispute, strong enough to put the party on inquiry. If so, it has to be connected, directly or by inference, with the property in dispute, otherwise it could hardly excite attention, or put the party on guard so as to make him enquire. In view of the facts of the case, and the final decision in this case, this construction of the above definition would seem to be justifiable. Thus, it was held that the actual and full knowledge

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1. Ibid., at p. 719. Also see "What is sufficent to put the party upon an inquiry, is good notice in equity." per Lord Chancellor, in Smith v. Low (1739) 1 Atk. 489, at p. 490. In this case certain lease, actually proved to be in the interest of the infants, was later challenged, but was held good.

possessed by the solicitor of his own fraud must be laid out of view; and the client, the last mortgagee, was not to be held cognisant - in law or constructively - of the fraud merely because the solicitor himself, the contriver and gainer of the transaction, knew it all well.[1] And, as observed by E. Sugden,[2] this seems to be the true rule; for, common sense revolts against an assumption that a solicitor committing such a fraud would communicate the fact to his victim. However, it was further held that the contents of the last mortgage and the unusual way in which the receipt was endorsed and signed were such as should have led to inquiry and therefore amounted to constructive notice.[3] The second mortgagee, as did the first, had completely failed to notice the circumstances on the face of the deed. And, though both were innocent, one, that is the second mortgagee, was made to suffer.

It has been observed[4] that according to the definition laid down in this case, the doctrine of constructive notice appears to be wider than one would have thought from the definition given in Plumb v. Fluitt (see above p. 412); for in that case though there was evidence to show that there was reason for further inquiry, it was held, in view of the facts of the case, that that was insignificant,[5] and hence the party was not attached with constructive notice.

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1. Kennedy v. Green, op.cit., at p. 720.
2. Op. cit., at pp. 768-769.
3. Kennedy v. Green, op.cit., at p. 721. While commenting upon this decision, E. Sugden has observed that
   "The solicitor committed the fraud upon his first client, and she by her negligence in executing the deed without reading it or inquiring why her name was to be endorsed by her on the deed, enabled him to commit a fraud on the solicitor's second client. Both were innocent, but one must suffer, and the suffering was inflicted on the last mortgagee, who did not notice the circumstances on the face of the deed, which had escaped the observation of the first mortgagee when she executed the deed in favour of her solicitor."
   per E. Sugden, op.cit., at p. 769.
4. J.Story, op.cit., at p. 259.
5. Plumb v. Fluitt, cit.above, at p. 439.

In the case of Jones v. Smith[1] (1841) a restrictive construction would seem to have been placed upon this doctrine. Here, a party, before advancing money on a mortgage, inquired of the mortgagor and his wife whether any settlement had been made upon their marriage, and was informed that a settlement had been made of the wife's fortune only, and that it did not include the husband's estate which was proposed as the security, and he afterwards advanced the mortgage money without having seen the settlement or known its contents.

While holding that the mortgagee was not, under the circumstances, affected with the constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate, Wigram, V.C., said,

> "It is, indeed, scarcely possible to declare a priori what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert that the cases in which constructive notice has been established, resolve themselves into two classes: First, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice; and secondly, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice." [2] (My emphasis).

In order to clarify the legal propositions in respect of both these classes of cases, he further stated that,

> "The proposition of law, upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instrument, which, in truth, related to the subject in dispute without

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1. (1841) 1 Hare, 43.
2. Ibid., at p. 55.

> his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law, upon which the second class of cases proceeds, is not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries, for the purpose of avoiding knowledge - a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the res gestae would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser - there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a bona fide purchaser, without notice."[1] (My emphasis).

This decision was upheld, on appeal, by the Lord Chancellor, Lord Lyndhurst. In his opinion, the present case did not go beyond this, that a prudent, cautious, and wary person would have inquired further. He said that,

> "The want of that prudence, caution, and wariness is not sufficient, according to the decisions and the principles which have hitherto been acted on, to affect the party with notice."[2]

The Lord Chancellor was not disposed to extend the doctrine of constructive notice to such a case as this where it appeared from the plaintiff's own evidence that the assignee had really believed the representation made to him to be true.[3] However, it has been observed that, "This doctrine might exclude the consideration of negligence in the mortgagee in not inquiring into the contents of a deed of which he has notice."[4] It may

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1. Ibid., pp. 55-56.
2. Jones v. Smith (1843) 1 Phill. 244, at p. 257.
3. Ibid., at pp. 253-254.
4. G.Spence, op.cit., at p. 754, f.n.(b); cf. E.Sugden, op.cit., pp.781-784. In fact, Wigram, V.C., has stated that what he said was 'clearly Sir Edward Sugden's opinion.' Vide Jones v. Smith, op.cit., at p.56.

be said that this observation would make sense only if the doctrine was intended to be of general application[1] to all cases on the subject irrespective of their facts and circumstances.

This would not seem to be the case, for, though Knight Bruce, V.C., - we may note the name, for it was he who had introduced the doctrine of the bona fide purchaser without notice into Hindu law - had decided the question of constructive notice on similar lines as in Jones v. Smith, his decision[2] was overruled by the Lord Chancellor, Lord Cottenham, in Penny v. Watts [3] (1849). Very briefly, the facts were that one Mr. Watts, who claimed under a marriage settlement as a purchaser without notice, had notice previous to his marriage that a legatee, the wife of the plaintiff, had given up her legacy under a will in favour of the intended wife, to whom the estate upon which it was charged belonged, and which was comprised in the subsequent marriage settlement, and had also notice that the intended wife had in consequence devised to the legatee a portion of the estate, and that the legatee was dead. This was held to be notice, as leading to inquiry, of an equitable reversionary title in the husband of the legatee under a subsequent agreement with the lady, the devisor, before her marriage, to convey the devised estate to him. As regards the scope of the doctrine, in the course of his

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1. Going by the phrase that 'for my present purpose' used by Wigram, V.C., (see above p.416), this would not seem to have been intended.

2. Penny v. Watts, (1848) 2 De G. & Sm. 501. Jones v. Smith (1843), Phill. 244, was particularly relied on by the defendant's counsels, who, also said that,
   "The tendency of modern decisions is to narrow and not to extend the doctrine of constructive notice."
   Ibid., at p. 516. How far this influenced the decision is not clear. However, the Vice-Chancellor was obviously, it seems, unhappy about the reversal of his decision; for, he later observed, "that the case, as now decided, appeared to him one of the strongest that he remembered as to constructive notice." Vide, ibid., (on 19th June, 1850), at p. 525.

3. (1849) 1 Mac. & G. 150, at p. 165.

judgement the Lord Chancellor said,

> "Now, these two facts coming to the knowledge of the Defendant, one party giving up a valuable pecuniary benefit, and the other in lieu thereof devising a certain estate, I think it is not carrying the doctrine of the Court further than it has often been carried to say that, knowing these facts, he was bound to enquire how these facts took place, and that, as he knew that the one party gave up the legacy, and in lieu thereof the other party had devised the estate, he cannot afterwards, if the fact be proved, say that he had not that sort of knowledge which will affect him with constructive notice of that which, if the facts be proved to exist, will show that the plaintiff had an equitable title by contract to have the devised estates conveyed to him."[1]

However, in the opinion of E. Sugden, "This seems to carry the principle too far."[2]

However, in Hewitt v. Loosemore[3] (1851) the Court would seem to have reverted back to the view held in Plumb v. Fluitt. The facts of the case were as follows: A solicitor deposited a lease with a person as a security with a memorandum, and four years afterwards assigned the lease to the defendant by way of mortgage. The defendant, a farmer, had no notice of the previous deposit, and of course he did not obtain possession of the lease, but he asked the solicitor, the mortgagor, for it, who replied that it should be delivered to him, but that as he was rather busy then, he would look for it and give it to the defendant when he next came to market.

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1. Ibid., at pp. 166-167.
2. Op.cit., at p. 766; cf. G.Spence, op.cit., at p. 754, f.n. (b), where he has expressed his hopes to the effect that the judgement of Lord Cottenham would have settled the point, i.e., if the defendant's want of knowledge arises from negligence he will be equally affected as if he had actually had notice.
3. (1851) 9 Hare, 449.

In view of the facts, Turner, V.C., held that the mortgagee by assignment could not be charged with the money secured by the deposit. He further held that as no other solicitor was employed, the mortgagor must be considered as the solicitor of the mortgagee, but he did not think that the latter was therefore to be considered to have had notice of the deposit. For, he said, "Such notice would be constructive merely, and constructive notice is knowledge which the Court imputes to a party upon a presumption,[1] so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated."[2] And he refused to act upon such a presumption in the face of the evidence which the plaintiff had himself adduced. For, in his view, the inquiry made for the lease, and the reasonable excuse given, left no ground for imputing suspicion of fraud or gross and wilful negligence, and the notice which is consequent upon it.

The controversy as to what degree of negligence would constitute constructive notice, or how much negligence would be considered enough to impute consequences of a constructive notice to the party, as seen from the above decisions, would seem to depend upon the significance attached by different judges, in the context of the facts of the case concerned, to the presumption upon which the doctrine of notice is founded.

Thus, as regards the presumption, Wigram, V.C., said, "A purchaser must be presumed to investigate the title of the property he purchases, and may, therefore, be presumed to have examined every instrument forming a link, directly or by inference, in that title; and that presumption I take to be the foundation of the whole doctrine."[3] What he meant was,

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1. As regards what is meant by this presumption see, Wigram's observation in West v.Reid (1843) 2 Hare. 249, at pp.260-61 quoted below.
2. Ibid., at p. 455; also see E. Sugden, op.cit., p. 769.
3. West v. Reid, (1843) 2 Hare, 249, at pp. 260-61. This case concerned the benefits arising out of a life insurance policy assigned to secure a sum of money owing to the assignee etc.

it seems, that a purchaser might be presumed to have investigated every instrument which directly or inferentially formed a link in the title to the property, but not instruments which were neither directly nor presumptively connected with it, and might only by possibility affect it. This view, compared with those of Lord Brougham in Kennedy v. Green (see above p. 413), and Lord Cottenham in Penny v. Watts (see above p. 418), would seem to take a slightly liberal view in favour of the purchaser or mortgagee. Both the views insist upon presumption of inquiry on the part of the purchaser, but when it comes to presumption in respect of pursuing that inquiry, one would want it to be pursued so far as it could reasonably lead while the other - the liberal view - would seem to accommodate some failure in this respect on the part of the purchaser, provided, in view of the facts of the case concerned, there was reasonable excuse to justify such failure with respect to further inquiry.

This circumstance would lead, as it obviously has, to variation in putting emphasis upon consideration of negligence in the process of determining constructive notice or fraud.

Thus, negligence manifested in failure, on the part of the second mortgagee in Kenndy v. Green, to notice the unusual circumstance on the face of the deed, was considered to be amounting to notice (see above p. 415). However, the other school of thought, represented by cases such as Jones v. Smith and Plumb v. Fluitt etc. has made distinction on the basis of excusable circumstance proved by the plaintiff's own evidence coupled with normal behaviour in the context of such circumstance of 'a prudent, cautious and wary person' (see above pp.415-417). According to the first view such failure to inquire would lead to sheltering or even encouraging fraud; (see above p. 414) while according to the latter view, such insistence upon inquiry would impose unnecessary and impracticable conditions in certain cases, leading to unnecessary

inconvenience[1] in alienations of property; for example,

> "a man, who mortgages a fraction of his estate, will thereby throw a cloud upon the title to the rest of his estate; and a devise of a single acre of land by a will, which does nothing more, will throw a cloud upon the title of an heir at law to his descended estates; for it is clear that neither the mortgagor in the one case nor the heir in the other can command the production of the mortgage deed or will: and it is equally clear that nothing but the production of the original itself would be sufficient, if a representation such as Smith relied upon be not sufficient."[2]

In the context of the facts of the cases concerned both these views would seem to be correct, though they could hardly be reconciled as general principles on the subject, and therefore could only be applicable to appropriate cases.

The Vice-Chancellor Wigram took opportunity in West v. Reid[3] (1843) to discuss the subject at length, and clarify certain misunderstanding in respect of his own language used in Jones v. Smith: "Gross negligence may be evidence of mala fides, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine."[4]

He said, "Negligence, as I understand the term, supposes a disregard of some fact known to purchaser, which at least indicated the existence of that fact, notice of which the Court imputes to the purchaser."[5] In his view, extreme caution may lead a person to inquire after a mere possibility, the existence of which he had no ground to surmise; but the omission to exercise such caution is not negligence in the legal sense of the term, nor, indeed, in any sense.[6] We may

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1. Lord Cranworth, L.C., "believed that the length to which the doctrine of constructive notice had been extended, had been often productive of very considerable inconvenience, and had injuriously impeded the free transfer of real property." Vide E.Sugden, op.cit., p. 783.
2. Said Wigram,V.C., (while explaining his view in Jones v. Smith,) in West v. Reid, op.cit., at p. 260.
3. (1843) 2 Hare, 249; at pp. 257-260.
4. (1841) 1 Hare, 43; at p. 71.
5. West v. Reid, op.cit., at p. 259.
6. Ibid.

observe that though ordinary diligence or caution has been expected from the purchaser in other cases such as Kennedy v. Green,[1] and Penny v. Watts,[2] none seem to have set the standard of extreme caution. However, the above definition would seem to express the correct view.

As regards the consequences of various degrees of negligence, it has been observed,

> "There may be a degree of negligence so gross that a Court of equity will treat it as evidence of fraud - impute a fraudulent motive to it - and visit it with the consequences of fraud, although morally speaking the party charged may be perfectly innocent;"[3]

but, as observed above, gross negligence is not in all cases to be treated as fraud, and these two factors are not to be treated as the same thing.

Apparently, the Courts were faced with the hardship which sometimes arose from the difficulty of drawing the nice distinction between cases of fraud and mere cases of implied notice.[4]

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1. (1834) 3 Myl. & Kee. 699.
2. (1849) 1 Mac. & G. 150.
3. G.Spence, op.cit., at p. 755. Also, see Wigram, V.C., in West v. Reid, op.cit., pp. 257-258. It may be noted that on this point there appears to be no difference of opinion among the decisions of Kennedy v. Green and Jones v. Smith.
4. Benham v. Keane, (1861) 1 J. & H. 685, at p. 702. This was a suit by a judgement creditor to establish his judgement debts as charges upon certain property of his debtor, since deceased, and for redemption and foreclosure against other incumbrancers. The purchaser from a mortgagee of the judgement debtor, taking with notice of a judgement which had not been registered as required by law, and having the legal estate - held not to be affected by such judgement. Also see, West v. Reid, op.cit., p.259: "I do not deny that difficulty may sometimes arise in drawing the line between the degree of negligence," etc. - per Wigram, V.C.

However, in these circumstances, it may be noted here that by the eighteen fifties opinions were expressed to the effect that it was highly inexpedient for Courts of Equity to extend the doctrine of constructive notice to cases to which it had not hitherto been held applicable. In this connection the Lord Chancellor, Lord Cranworth, observed,

> "Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It is obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down."[1]

The observation concerning limitation on the scope of this doctrine, would seem to have been based on the fear[2] that

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1. Ware v. Lord Egmont, (1854) 4 De G.M. & G. 460, at pp.473-74. Also, see, Montefiore v. Browne, (1858) 7 H.L.C. 241, at p. 269; where Lord Chelmsford, L.C., said, "I do not recede at all from what I am reported to have said in the case of Ware v. Lord Egmont (4 De G.M. & G. 473), namely, that this doctrine of constructive notice ought not to be extended. But, at the same time, I said that, in my opinion, every purchaser or mortgagee must be considered as having notice, not merely if he might have obtained, but if he ought to have obtained a knowledge of that with which he is to be affected."
2. While commenting on the above case, E. Sugden has said "The case shows to what danger a purchaser or mortagee is exposed by this doctrine of constructive notice. I fear that, if still at the bar, I should have thought that further inquiry on the part of the mortgagees was unnecessary."
   Op. cit., at p. 779. Also, see f.n.1, at p. 422.

the insistence upon further inquiry on the part of a purchaser or mortgagee, being unnecessary, exposed them to the danger of losing their purchase or security. Also, the remarks show how little capable the doctrine is of a strict definition.

In conclusion, to sum up the legal position on the subject under consideration during the eighteen fifties, it may be said that,

> "Notice in equity means not only actual notice, but also constructive notice. The Court will impute to a party knowledge of a fact which he would have known had he not avoided the discovery of it, or of a fact which he might have known had he pursued normal enquiries. When a man is in a position to know a fact he is presumed to know it and is not allowed to lead evidence to the effect that he did not have actual notice of it."[1]

However, in practice, the Courts would seem to have been divided on the question of whether or not a party might be fixed with constructive notice in a particular case. It all depended, it seems, upon the facts, circumstances and intentions of the parties in the dispute before the Court. Thus, in view of the facts, the Courts would seem to have favoured, in certain cases, that the party charged should have followed his inquiry so long as the scope for further inquiry existed, and was necessary in the eyes of the Courts. But, on the other hand, the Courts were reluctant to apply that standard in respect of inquiry in those cases, at least, where they were satisfied, upon the evidence before them, that it was not called for in the interest of justice. According to the latter view, the question upon constructive notice was not whether the purchaser had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence: a view, if applied as a general rule,

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1. J.D.M. Derrett, at 10 Luck. L.J., op.cit., at p. 5. We may note here, that "At common law notice was equated with honesty." See, R.Goff & G.Jones, The Law of Restitution, (London, 1966), p. 501.

that would seem to undermine the duty to enquire placed upon the alienee who deals with trustees or limited owners of property. However, the onus of proving 'gross or culpable negligence' on the part of the defendant, was placed upon the plaintiff, as we have seen above (see above p. 421), only in those cases where there was evidence, on the one hand, to lead the Court to believe that the plaintiff was not altogether honest in his dealings with the defendant, and that, on the other hand, the defendant made some enquiries and either bona fide believed in what the plaintiff told him or made enquiries but was completely deceived. It may therefore be said that such a rule would apply to only those cases which involved, at least, suspected fraud. Of course, the party committing fraud or the party who had notice of such a fraud was not allowed to take advantage of it. Thus, for example, in Le Neve v. Le Neve[1] (1748), where the defendant had concocted with his attorney a plan for getting rid of his marriage settlement, and where his second wife was fixed with notice of the same through her solicitor who had acted throughout the transaction; Lord Hardwicke, the Lord Chancellor, while giving the decree against the defendants, and in order to explain the foundation of the doctrine of notice, said,

> "The ground of it plainly is this, that the taking of a legal estate after notice of a prior right, makes a person a mala fide purchaser (and not, that he is not a purchaser for valuable consideration in every other respect); this is a species of fraud, and dolus malus itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate."[2]

Thus, fraud or mala fides was, in his opinion, "the true ground on which the Court is governed in the cases of notice."[3]

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1. (1748) 3 Atk. 646.
2. Ibid., at pp. 654-655.
3. Ibid.

As regards the scope of the doctrine of notice, suffice it to say that similar rules existed both in Equity and common law.[1] At common law notice was equated with honesty, and accordingly, a thing was deemed to be done in good faith if it was in fact done honestly, irrespective of whether it was done negligently or not; and therefore, constructive notice would not prevent the holder of a bill being a holder in due course, provided that he was not in bad faith.[2] This apparent distinction between notice at law and in equity would seem to have been based on sound principles. As Lindley, L.J., observed,

> "The equitable doctrines of constructive notice are common enough when dealing with land and estates, with which the court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extention of these doctrines, and the protest is founded on good sense. In dealing with estates in land title is everything and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title ; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country."[3]

As it is not necessary for our present purpose, it may be sufficient to point out that the doctrine of notice would seem to apply mainly to cases involving proprietary claims;[4] and also to transactions involving 'illegal or immoral' contracts,[5] for in such cases, notice of 'taint', due to illegality or immorality, plays an important part.

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1. "Now, if a person does not stop his hands, but gets the legal estate when he knew the right in equity was in another, machinatur ad circumveniendum; and it is a maxim too in our law, that fraus & dolus nemini patrocinari debent. Co. 3 Rep. 78 b." Ibid., at p. 655.
2. R.Goff & G.Jones, op.cit., p.501.
3. Manchester Trust v.Furness (1895) 2 Q.B.539, at p. 545.
4. R.Goff & G.Jones, op.cit., pp. 500-502.
5. G.C.Cheshire and C.H.S.Fifoot, The Law of Contract, 4th edn., (Lon.,1956), pp.289 ff; Halsbury's Laws of England, 3rd edn. (by Lord Simonds), (Lon.,1954), vol.8, pt.4, sec.4, cl.259, at p.152.

VII.4 ITS PROPER PLACE IN MODERN HINDU LAW

Before we begin to assess the proper place of the doctrine of notice in modern Hindu law, it is necessary to note the basic difference between Equity and Hindu law in respect of the nature of the property and the proprietary rights involved concerning the property. In equity, the Courts have treated the assets as the debtor, or as a trust fund in the sense of an ordinary trust, to be administered by the executor for the benefit of all persons who are interested in it, such as legatees, creditors, distributees, etc., according to their relative priorities, privileges and equities.[1] But in Hindu law the ancestral property is, as explained above (see chapter I), vested in coparceners, and if the family consisted of the father and his sons, for example, they all own it equally, and the father's power of alienation of such a property is restricted to 'just' purposes as understood in Hindu law. Although certain members of the family might be entitled to maintenance etc., the question of legatees hardly ever arises in Hindu law. And even if the doctrine of pious obligation allows the father to encumber his sons' interests, that power, too, is subjected to 'his just debts'. In these circumstances the validity of any encumbrance upon such joint family property in general would depend upon the nature of the purpose of the father's alienation. There was no provision in *śāstric* Hindu law for entertaining equitable claims such as understood in the English law of trusts, if such claims were outside *vyavahāra*.

Then again, the Courts of Equity do not supersede the principles of law upon the same subject; and hence,

> "a sale made *bona fide* by the executor, for a valuable consideration, even with notice of there being assets, will be held valid, so that they cannot be followed by creditors or others, into the hands of the purchaser. In

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1. J.Story, op.cit., at p. 578.

> this respect there is a manifest difference between the case of an ordinary trust, where notice takes away the protection of a bona fide purchaser from the party, and this peculiar sort of trust, mixed up in some measure with general ownership. To affect a sale or other transaction of an executor, attempting to bind the assets, so as to let in the claim of creditors and others, who are principally interested, there must be some fraud, or collusion, or misconduct between the parties."[1]

Perhaps it was this latter kind of trust which might have seemed, in the eyes of the Privy Council, to resemble the ownership of joint family property in Hindu law. For, as will be shown presently, they were dealing with the alienations made by a manager - a limited owner - of an infant, and at the same time their attention was drawn to a dictum, relied on for the purpose of placing onus of proof on the infant plaintiff, which was taken from the case in which collusion between the father and his sons was alleged. If this is correct, then it may be said that the scope of the doctrine of notice in the Hindu law of debts, if any, would not go beyond the cases involving outright collusion or fraud.

Let us first explain how the Privy Council brought this doctrine into Hindu law. Thus, in Brown v. Ram Kunaee Dutt[2] (1848) the alienee, who alleged that he had advanced a certain loan to the guardian of the minors, lost his claim because in view of the Court he had failed to prove that the money was borrowed on account of the minors, and that the same was appropriated to the payment of alleged decrees to save the ancestral property of the minors. But in Oomed Rai v. Heera Lall[3] (1851) the sons appeared to have failed because they could not discharge the onus of disproving the charge created

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1. Ibid.
2. (1848) 4 S.D.A.R. 791. This was a case in which the plaintiff promised to the guardian that he will pay the amount to save the ancestral property of the minors, but in fact he did not do so. Also, he had fraudulently obtained the guardian's signature on the bond.
3. (1851) 6 S.D.A. (N.W.P.) 218.

by their father, once the father's creditor had established the charge by proving the fact of advance of money to the father. This was a case of suspected collusion[1] between the father and his sons.

Relying on the dictum, however, it was argued in Hunoomanpersaud Pandy v. Musst. Babooee Munraj Koonweree[2] (1856) that if the factum of a deed of charge by a manager for an infant was established, and the fact of the advance was proved, the presumption of law would be prima facie to support the charge, and the onus of disproving it would rest on the heir.

After referring to the facts of that case, that is Oomed Rai's case, Knight Bruce, L.J., said,

> "Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently, this dictum may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in suits of the danger of collusion between father and the sons in fraud of the creditor of the former. But this case is of a description wholly different, and the dictum does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the onus of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and depend on them. Thus, where the mortgagee

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1. For further details, see above pp. 261-62.

2. (1856) 6 M.I.A. 393, at p. 418. For further details, see above p.262, f.n.2.

> himself with whom the transaction took place is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan."[1]

This was not a case of avyāvahārika debts, but the rule laid down here by the Privy Council later became the foundation in respect of the doctrine of onus of proof in cases where alienations made by a limited owner were involved. According to the Privy Council the rule in respect of fixing the onus of proof in such cases was necessarily a flexible one, which would vary with circumstances and should be regulated by and depend on them. In its view, generally the party possessing better knowledge of the facts should be made to allege and prove the facts; or in cases of collusion and fraud, the burden of proof should be placed on the fraudulent party.

The dictum which led to these propositions came, as we have seen above, from the case[2] in which collusion between the father and his sons in fraud of the creditor was suspected. The phrase 'in fraud of the creditor' may be noted here for it too comes from the English law of trusts.

Afterwards, while dealing with the powers of the manager for an infant heir, the Vice Chancellor, Knight Bruce, observed,

> "The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The

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1. Ibid., pp. 418-419.
2. Oomed Rai v. Heera Lall, discussed above p.429 ff.

> actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted mala fide, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived."[1]

Now, before going any further, we must note that the Privy Council was dealing with the manager's power, and not with the avyāvahārika debts. Moreover, for these propositions

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1. Hunoomanpersaud's case, op.cit., at pp. 423-424.

no authority - Hindu law or otherwise - was cited[1] by his Lordship. Had the Privy Council been alerted in respect of the Hindu law rule concerning avyāvahārika debts, perhaps, it would not have laid down these propositions in this fashion. But we cannot blame the Privy Council on this account because it was not dealing with such debts.

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1. Though one suspects if the Privy Council were thinking of similar disputes involving alienations by limited owners of the property in English law of trust and equity. Speaking particularly of the Vice-Chancellor Knight Bruce one feels almost sure that he might have been thinking of the cases, it seems, such as Stroughill v. Anstey (1852) 1 De G.M. & G. 635, (see the head note in the report); and Firmin v. Pulham (1848) 2 De G. & Sm. 99, at p. 101. The former was an appeal from his decision and the latter was decided by him. These two cases approve of the view that a purchaser or mortgagee is not bound to see to the application of the money raised. Also, for the similar view see M'Queen v. Farquhar (1805) 11 Ves. Jun. 467, at p. 479, Eldon, L.C., has said "how they (that is vendors) disposed of it afterwards as to their respective interest was not of any importance to him," (i.e., a bona fide purchaser). Also see, E.Sugden, op.cit., pp. 779-780.

   Concerning the distinction in reference to raising of money not apparently for a payment of a charge, between the case of a man who is owner as well as trustee, and that of a man who holds the property merely as a trustee subject to a charge; and as regards to purchaser's conduct while dealing with such parties, see Stroughill v. Anstey, above, pp. 654-655. There, the Lord Chancellor, Lord St. Leonard, (formerly Sir E. Sugden), has said that people dealing with trustees "must be considered as under some obligation to inquire and to look fairly at what they are," i.e., to see that no breach of trust is committed. And also, it may be noted, that the Lord Chancellor, while stating the above, was, in his own words, "endeavouring to lay down a rule to make them (i.e., purchasers and mortgagees) more secure than perhaps they have hitherto been."
   Ibid., at p. 655.

However, the fact is this, that in the above context - the powers of a manager[1] for an infant heir - it introduced the doctrine of bona fide lender, and said that 'unless he is shown to have acted mala fide, he will not be affected.' And it is this terminology which was later relied upon, as will be shown presently, for the purpose of placing the additional burden of proof upon Hindu sons to show the creditor's knowledge of the immoral nature of their father's debt. The first case which relied extensively on the above propositions was, it seems, the case of Musst. Junnuk Kishoree Koonwur v. Baboo Rughoonundun Sing[2] (1861). It was alleged that the minor son was not bound by his father's various alienations of the joint family property because they were avyāvahārika. The Court found that all the debts of the father were incurred for extravagant spending caused by dissipation, but it refused to hold them avyāvahārika. In spite of this finding, however, all the sales, except those which were made under court-auctions, were reversed in favour of the son, on the ground that the purchaser was not a bona fide purchaser for value without notice. In the opinion of the Court,

> "The property sold being of a value far beyond the amount of decrees; that granting even if

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1. For, whatever is said there was in the context of a manager only, and nowhere in the whole quotation is there any mention, expressly or by implication, of the term 'father' or 'father-manager'.
   Besides, it is difficult to believe that the Privy Council would affirm, first, the rule of Hindu law that the son's pious obligation to pay his father's debt depends upon the nature of the debt (see above p. 59 or p. 421 of the report); and immediately afterwards would lay down, in the same case, another rule which would virtually nullify the first one.
   In view of the above, it may be said that the proposition concerning 'bona fide lender' was intended to be applied only to the alienations made in the capacity of an 'ordinary manager' as such, and not by a 'father-manager'. The former could bind others only to the extent of the family necessity, while the latter, in addition, would bind his sons' interests for his own vyāvahārika debts under the doctrine of pious obligation, (see above chapter I).
2. (1861) 1 S.D.A. (L.B.) 213; for further details see above pp. 262-264.

> plaintiff is unable to displace the sales which have taken place in execution of judicial decrees on the only ground on which a displacement would be legitimate, viz., the immoral purpose of the loan patent on the face of the decrees, still the other sales are liable to reversal as being made without any necessity, and not only were they made on the part of the vendor without any legal necessity under Hindoo law, but they have been purchased on the part of the purchaser without any enquiry and caution with a view to seeing that no breach of trust was committed, which a party, dealing with a person in the position of the plaintiff, a party a trustee with a restricted right of sale, should have used,[1] that considering the position of the father and that of the person purchasing, relations in most instances to each other, the latter, therefore, cognizant of all the circumstances of the family, it was incumbent on them, (as laid down in Hunoomanpersaud's case), to prove the facts presumably better known to him than the infant heir. ... That consequently, with exception of the sale made in execution of decrees, all the sales should be reversed as having been without authority under Hindoo law."[2]
>
> (My emphasis).

Apparently, the Court dealt with these sales in view of the father's limited power as a manager. Prima facie the judgement appears to be sound and just, but it - at least the material portion of it - was not based on any known principle of Hindu law. If the debts were not avyāvahārika, then, according to Hindu law, the son was clearly liable. True, the alienations seemed apparently unjust. Without realising, however, the significance of the distinction between powers of an ordinary manager and those of a father-manager (see above, f.n.1 at p. 434), the Court applied the proposition laid down by the Privy Council in order to do justice so far as it was possible under the English law of trusts and equity, the consequences of which, as we shall see, proved to be not entirely satisfactory from the point of view of Hindu law.

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1. For this, besides Hunoomanpersaud's case, above, the Court relied on Stroughill v. Anstey, see above, f.n.1, p.433.
2. Musst. Junnuk Kishoree's case, op.cit., p.221.

In short, the decision would seem to mean this: that as he was dealing with a limited owner, the purchaser ought to have made enquiry; that he was proved to be 'cognizant of all the circumstances', that is, he was proved to have notice of the facts that there was no just cause for the sale, hence he was not a bona fide but mala fide purchaser, and mala fides being a species of fraud[1] (see above, p.426), a Court of justice would not allow him to take advantage of his own fraud.

Regarding the sales made in execution of judicial decrees, the Court held,

> "Freedom on part of the son as far as regards ancestral property from the obligation to discharge the father's debts under Hindoo law, can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion, that the plaintiff has been unable to show that the expenses for which those decrees were passed, were, looking to the decrees themselves, and we cannot now look beyond these, immoral, and such as under Hindoo law, the son would not be liable for; we must therefore decline to interfere with the 5 sales, ..., which have taken place by the intervention of the Courts for debts, which, though caused by extravagance, were such as a son would be liable for;"[2] (My emphasis).

However, were the immoral purpose of the expenses, for which the decrees were passed, patent on the face of decrees themselves, the Court would seem to have been prepared to interfere with even these sales (see the previous quotation on p. 435 above).

In view of our present concern, it may be observed that in fact the issue of purchaser's notice was neither raised

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1. That "the transaction seems to have been part of a system entered into by certain parties, including the principal defendant, to ease plaintiff's father of his ancestral property by supplying his extravagances."
   This finding - (see, ibid., at p.223) - of the Court would prove beyond any doubt that it was all a big fraud.
2. Ibid., at p. 222.

nor even commented upon as such; though, were the immoral purpose present on the face of the decrees, it is possible to argue, such evidence would have been sufficient to impute actual or constructive notice of the invalid nature of the original debts to the purchaser concerned. But the fact that all this was said only after the Court had already decided that the debts were not avyāvahārika would hardly support an inference [1] to the effect that it meant proving, on the part of the son, the purchaser's knowledge of the 'immoral' nature of the debts. The doctrine of bona fide purchaser was relied upon only while considering the validity of the alienations made by the father in his capacity as a manager, i.e., on the ground of legal necessity. It would seem to be the Court's view, that in the absence of immoral nature of the debts, the existence of decree debts was sufficient necessity justifying the judicial sales.

The case of Girdharee Lall v. Kantoo Lall[2] (1874) involved two appeals, but the questions raised in the appeals had nothing to do with avyāvahārika debts. Certain sales, one private and another through the intervention of the Court were challenged on the ground of lack of legal necessity. Collusion between the fathers and their sons was suspected. Relying on the principles laid down in the case of Hunooman-persaud (see above pp. 430-432), and having regard to the

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1. After referring to this case, the Privy Council concluded that in this decision, "it was held that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose;" and in support, it has quoted the above passage. - Girdharee Lall's case, (1874) 1 I.A. 321, at pp. 332-333. However, the P.C., in Suraj Bunsi's case (1879) 6 I.A. 88, at p. 105, construed the same passage thus, "that the son was under an obligation to pay the debts of the father if not contracted for immoral purposes, and that he had failed in this case to prove as against the purchasers under the decrees, that they were so contracted". (My emphasis). The underlined phrase was not mentioned, nor could it be properly inferred from the passage concerned.

2. (1874) 1 I.A. 321. For facts see above, p.265..

decision in Musst. Junnuk Kishoree's case, above, the Privy Council held in favour of the purchasers. In course of its judgement in respect of the auction-sale, the Court restated the principle of bona fide purchaser, and observed that a purchaser under an execution need not enquire beyond the decree itself.[1] In this context the role of the doctrine of notice would not be ignored, but nothing was said about it in this judgement.

However, the Privy Council, in Suraj Bunsi Koer v. Sheo Proshad Singh[2] (1879) drew two propositions from the two cases discussed above (see pp. 434-437):

> "1st, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they shew that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and 2ndly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."[3] (My emphasis).

With respect, the underlined deductions of the Privy Council would seem to be wrong (see above p. 437, f.n.1). For the principle of bona fide purchaser was not applied in either of the above cases while determing the son's liability in respect of proved avyāvahārika debts of the father, but only after the sons were found to have failed to prove the immoral nature of the debts concerned. These two cases have clearly affirmed[4] the rule that the son would not be liable

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1. Ibid., at pp. 333-334.
2. Op.cit., see f.n.1 at p. 437 above. For facts, see above p. 266.
3. Ibid., at p. 1o6.
4. Musst. Junnuk Kishoree's case, op.cit., at pp. 221-222, and Girdharee Lall's case, op.cit., at p. 331, (para.2).

for his father's debts contracted for immoral purposes. The sons' liability for their father's debts was therefore considered in the context of 'legal necessity', i.e., in view of the father's capacity as a manager of the joint Hindu family. Any observations made in these cases in respect of avyāvahārika debts of the father were plainly obiter dicta.

In the present appeal, the debts were proved to be avyāvahārika and the sons had, by their objections, made it clear before the auction took place, that the decree was passed for those debts of the father which were not binding on them. On the other hand the Counsel for the respondents, Leith, Q.C., argued, among other things, that "the purchaser here was under a decree without notice actual or constructive that the sons had adverse claims."[1] One suspects whether this argument led the Privy Council to formulate those propositions based on different facts and circumstances and decide the case upon such basis.

However, as J.D.M.Derrett has observed,

> "If we examine the facts we find that firstly there was taint, and secondly that the purchasers had actual or constructive notice of it, wherefrom it follows that it would be wrong to contend that the case laid down that if the debt were tainted and the sons could not show that the lender had notice of the taint, then the sons could not escape liability. Here is a simple case where, on the facts, the purchasers were bound to take subject to the sons' right to withdraw their interests. The further proposition, that the sons must prove both taint and knowledge thereof before they can escape, by no means followed - though it might appear to follow to someone not

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1. Suraj Bunsi's case, op.cit., at p. 94. However, under Hindu law, such plea as this particularly when there are sons in the family, is useless. See J.D.M.Derrett, at 10 Luck. L.J., op.cit., at p. 5.

thoroughly familiar with Hindu law."[1]

Thus, it would appear that the proposition in respect of notice would seem to have been misconceived (see above, p.437, f.n.1), and applied as if in order to meet the argument advanced which could have been easily countered as being without foundation in view of Hindu law. For, until this decision, the son was not required under Hindu law to prove either a lender's or purchaser's knowledge of the avyāvahārika nature of the father's debt. We may respectfully observe that the Privy Council had failed in the first place to grasp[2] the significance of the provisions of Hindu law on the subject before laying down the propositions, and therefore it was not aware, it seems, of their consequences. In any case what the Privy Council meant by the notice in this case was a clear hint to the purchasers that the debts were of the tainted nature. It would at the most amount to constructive notice sufficient to put them on their guard. For, in view of the facts of the case, the utmost that could be said against them is that they had notice that the sons impeached the debts as being tainted with immorality. Thus, it would appear that in view of the Privy Council it was notice enough if the sons made it known to the Court before the sale takes place, that they impeached the debts on the ground of avyāvahārika.

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1. Ibid., at pp. 9-10. Also see,
   "Now in this case it will be observed that it was never suggested that the minor plaintiffs were bound to show, not merely that the money was borrowed for immoral purposes, but that the lender, Bokali, had notice of the purpose for which it was borrowed. ..., but there was no such issue, nor was it suggested, nor could it well be suggested that the purchasers had knowledge of the immoral nature of the debt."
   observed the Court in Maharaj Singh v. Balwant Singh, op.cit., at pp. 533-534; also see below p.444.

2. "The draft judgements of the Privy Council often have small amendments made in them by members of the Board who are not experts in the topics under consideration." - per J.D.M. Derrett, cit.above, 10 Luck. L.J., at p. 9.

In Hanuman Singh v. Nanak Chand[1] (1884), although the defence was not based upon the proposition laid down by the Privy Council discussed above, the son's appeal was dismissed on the ground of his failure to prove the avyāvahārika nature of the debt and the creditor's knowledge thereof; for, in the opinion of the Court, there was collusion on the part of the son and his father (as regards collusion, see above f.n. 6 at p.268). As we have already observed above (see p.270), this decision is of doubtful authority. No issue was raised as regards the lender's notice, and therefore, the remarks to that effect would seem to be obiter. However, in Mahabir Prasad v. Basdeo Singh[2] (1884) the sons contended against the defence of bona fide purchaser without notice that, having regard to the invalid nature of the debt, they were entitled to recover their shares in the property. While awarding the decree to the sons, and rejecting the question of notice, the Court observed,

> "And it is further to be considered whether, under such circumstances, any notice to the purchaser was necessary. The maxim, in jure, non remota causa, sed proxima spectatur, does not, however, apply to any transaction originally founded in fraud, and much less in proved crime, 'for the law will look to the corrupt beginning and consider it as one entire act'; and again, on the same page - 'neither does the above rule hold in criminal cases, because in them the intention is matter of substance, and, therefore, the first motive, as showing the intention, must be principally regarded (Broom's Legal Maxims, 2nd ed. 1858, p. 170).' The principle of the law so stated appears to me to render the question of notice immaterial."[3]

One wonders whether the Court is talking here about Hindu law! However, the learned Chief Justice went on to hold that the

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1. (1884) I.L.R. 6 All. 193. For facts etc. see above pp.268-70.
2. (1884) I.L.R. 6 All. 234: for facts and further discussion, see above p.371ff. The facts of the case clearly disclosed at least reasonable constructive notice; (see ibid., at p. 239).
3. Ibid., at p. 237 (per Stuart, C.J.).

purchaser had reasonable constructive notice. Apparently, the question of the onus of proving the purchaser's notice by the son would seem, supposing that it has place in Hindu law, to depend[1] upon the facts and circumstances of each case.

In Krishnaji v. Vithal Ravji[2] (1887), although the son had proved the immoral nature of his father's debts, the High Court held[3] that to succeed against the auction-purchasers

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1. However, the same High Court would seem to have treated the above rule as if it was an universal rule applicable to each and every case. For, in Lal Singh v. Deo Narain Singh (1886) I.L.R. 8 All. 279, the sons had challenged their father's sale of ancestral property on the ground of lack of necessity and immorality. The District Court had placed onus of proof upon defendants who in appeal contended that the sons should prove that the debts were immoral. However, while remanding the issues for determination, the High Court, raised the first issue at p.282 as: "Have the plaintiffs established that those debts were contracted for immoral purposes, and that at the time of the sale was impeached the defendants had notice they were so contracted?" (My emphasis). This shows that the Courts in India were not yet sure as regards the applicability of the rule.

2. (1887) I.L.R. 12 Bom. 625, for facts and further discussion, see above pp. 27o-271.

3. Ibid., at p. 631. This rule was merely referred in Bhagbut Pershad v. Musst. Girja Koer (1888) 15 I.A.99, at p.104. This case is discussed above pp.271-272 . In Bhavani Bakhsh v. Ram Dai (1891) I.L.R. 13 All. 216, at p. 223, the question of notice of taint to the creditor was considered, in the absence of any contention to that effect, and also perhaps wrongly; and in view of the facts (see above pp. 274-276 the Court's observation on the question was obiter. Also see Beni Pershad v. Puran Chand (1895) I.L.R. 23 Cal. 262, at p. 275 the rule has been referred to in passing. A similar dictum is found in Kishan Lal v. Garuruddhwaja (1899) I.L.R.21 All.238, at p.240. Also, see above p. 278 for facts and further discussion of the case.
Also, in Devi Ditta v. Saudagar Singh, (1900) 35 P.R.No.65, p.291, at pp. 296-297 it has been stated that an alienee who is himself the antecedent creditor by his position is prima facie fixed with knowledge of the nature of the debts and of the purposes on which the money borrowed has been spent.

he must also prove that the alienees knew that the debts were contracted for immoral purposes. The Court would seem to have felt compelled to follow the propositions laid down in Suraj Bunsi's case simply because they were "still in force unqualified by any decision."[1] Nothing more is said there about this case. The manner in which it was followed would seem to show that the Court was not altogether happy. However, this decision was perhaps the first one in which the son's pious obligation was applied in the name of the Hindu law to pay his father's immoral debts, from the payment of which he is expressly immune under the same law. And all this would not have been possible but for the distinction made between the judicial and other sales. However, as observed by Melvill, J.,

> "If relief is to be given upon the ground in this country, it must be given, not on account of any distinction between a legal and equitable estate (see Phear, J.'s observation at p.408, volume VII, Calcutta Weekly Reporter), but because the innocent purchaser is supposed to have been the victim of fraud on the part of the vendor, and of laches on the part of the prior incumbrancer",[2] (My emphasis).

This would seem to mean that unless the father and perhaps his sons were guilty of some fraudulent conduct as against the purchaser, such relief should not be granted merely because the purchaser had no notice. For, as the same Judge has explained,

> "A purchaser at a Court sale takes the estate subject to all existing liens, whether he has had notice of them or not. A Court sale is only a process by which a Court does for a debtor what he is bound to do for himself, i.e., to sell

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1. Krishnaji's case, cit.above, at p. 631, per Parsons, J.. Perhaps this was an example of following precedents without much regard for provisions of Hindu law on the subject, or, even if the facts and circumstances of the case were dissimilar from the case which was followed.

2. Sobhagchand v. Bhaichand, (1882) I.L.R. 6 Bom.193, p.206.

> his property in order to pay his debts. If he did for himself he would be bound to protect the rights of prior incumbrances; and the Court, which acts for him, is equally bound to do the same."[1]

Seen in the light of these observations, the protection given by the Court to the auction-purchasers in this case, irrespective of whether they were strangers or not, could hardly be justified under Hindu law, in the absence of any fraudulent conduct on the part of the father and his son.

In Maharaj Singh v. Balwant Singh[2] (1906) the doctrine of notice was invoked in these terms: 'the son is liable to pay the debts of his father unless he can show that these debts were incurred for immoral purposes, and that the creditors who made the advances did so with the knowledge of the object of the loan.' However, while rejecting it, the Court observed that,

> "Experience tells us that his licentious mode of life was not and could not have been concealed from his neighbours. It was no doubt the common talk of the bazar. No intending lender could fail to have learnt of it if he had made any inquiry whatever. We know of no express authority for the proposition advanced by Mr. Sundar Lal that a son who disputes his liability to pay his father's debt contracted for immoral purposes must ordinarily prove that the lender was aware of the object for which the money was borrowed, though there is the highest authority that he must do so if he is attempting to recover ancestral property which has already passed out of the family. If the onus of proving such knowledge lies on a son, it would be, we think, next to impossible for him to discharge it."[3]

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1. Ibid., at pp.206-207. Though this was not a case of avyāvahārika debt, reliance on it for the present purpose would seem to be justifiable in view of apparent improper use to which the doctrine of bona fide purchaser would seem to have put by the (incidently) same Court.
2. (1906) I.L.R. 28 All. 508; for facts and further discussion, see above pp. 281-284.
3. Ibid., at p. 521.

(It may be noted here that Burkitt, J., who referred to the doctrine in passing in Kishan Lal v. Garuruddhwaja (1892), see above f.n.3 at p.442, was one of the judges who decided the present case.)

After a thorough discussion of leading authorities on the subject, the Court came to the conclusion that,

> "It is common experience that money-lenders readily advance loans on any class of landed security, taking considerable risks, but charging high if not exorbitant rates of interest. It is no easy matter for sons to satisfy the heavy onus which lies upon them in impeaching loans obtained for immoral purposes, but it would, we think, be the death-blow to the rule of Hindu law which gives immunity to sons when defending their title to ancestral property from liability to their father's immoral debts, if it were the law that in order to absolve themselves from liability the sons must prove, not merely the purpose for which such loans were contracted, but also that the lenders knew of the immoral purpose of the loan."[1]

Although obiter, these views seem to fit perfectly into the terms and spirit of Hindu law.[2] The Madras High Court came to similar conclusion in Savumian v. Narayanan[3] (1914). It held that while claiming exemption from the liability on ground of

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1. Ibid., at pp. 544-545.

2. In this regard, we may cite J.D.M.Derrett, cit.above, 10 Luck. L.J., p.12, where he has said,

   > "It is of great importance to note that in Uttar Pradesh, where so many cases in the Pious Obligation have arisen since 1906, the dictum in Maharaj Singh stands uncorrected (particularly from 1906 to 1925 when the case of Sat Narain was published): therefore the presumption that it is correct has more than half a century's authority in a leading High Court."

   Also see Babu Singh v. Behari Lal (1908) I.L.R.30 All.156, at p. 159 the Court has expressed similar view. For facts, see above p. 284.

3. A.I.R. 1914 Mad. 244, at p. 245, c.2; for facts, see above p. 332. This decision was later regarded as the conclusive authority on this point in Lakshmanaswami v. Raghavacharulu, (see below, f.n.3 at p.446), at p. 295, c.1.

illegality of the debt, the sons were not required to prove that the creditor had notice that the antecedent debt of their father was immoral.

The case of Sat Narain v. Behari Lal[1] (1925) involved no question of tainted debt nor that of notice. The question was whether the joint family property became vested in the Official Assignee when the father was adjudicated insolvent; and also, a question of preemption rights was involved. However, while dealing with these questions the Privy Council observed in passing that,

> "When the decree which was executed was made in a suit to which the sons were not parties and the property sold was the joint property of the father and the son the sale was good on the principle of Hindu law that it is the pious duty of a Hindu son to pay his father's debts unless it is shown that the debt in respect of which the decree was made was contracted by the father to the knowledge of the lender for the purposes of immorality."[2] (My emphasis).

This observation was irrelevant in view of the issues involved; besides, as pointed out by Patanjali Sastri, J., (as he then was),

> "The reference in this passage to the lender is perhaps an inadvertent slip as it is difficult to see how the lender's knowledge of the immoral purpose can render the sale bad if the execution purchaser had no knowledge of such purpose and purchased the property bona fide for valuable consideraton."[3]

However, once again the doctrine was invoked, relying upon the above dictum, in Lakshmanswami's[4] case in 1943. Here the debts were proved to be avyāvahārika, and the High Court

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1. A.I.R. 1925 P.C. 18.
2. Ibid., at p. 22, c.1
3. Lakshmanaswami v. Raghavacharulu, A.I.R. 1943 Mad. 292, at p. 296, c.1.
4. Ibid.

rejected the contention saying that,

> "The Hindu law no doubt casts a pious obligation on the son to discharge his father's debts except those falling within certain categories which are usually referred to as illegal or immoral. But this obligation, it is well to remember, was based on the religious duty of the son to relieve the father from the evil consequences arising from the non-payment of his debts and was not designed for benefit or the protection of his creditors; and similarly an examination of the Smrithi texts relating to the excepted categories show that they are based solely on the impropriety of the father's conduct in contracting the debt, and have no relevance to the propriety or otherwise of the creditor's conduct in advancing the loan. The position therefore is that if the father's debt is free from taint, a pious duty is laid on the son to rescue the father from the penalties of indebtedness the resulting advantage to the creditor being purely incidental; if, on the other hand, the debt originates in the father's misconduct the pious duty ceases to operate, and the son is not bound to pay off the debt however bona fide the creditor may have been in advancing the loan. It follows that all that the son has to prove to establish his immunity from the pious obligation in a suit by the creditor is the immoral character of the debt, and it is not incumbent on him to show further that the creditor lent with the knowledge that the debt was contracted for an immoral purpose;"[1]
> (My emphasis).

Perhaps this is the most accurate exposition of the legal position, in view of Hindu law on the point under consideration, that we have come across so far, and one feels inclined to agree with this view; for, if there is no pious duty, the son should not be made to pay in the name of the pious obligation. Moreover, in view of the creditor's knowledge of

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1. Ibid., at pp.295-96; cf. the remarks to the effect that the son has also to satisfy the Court that the creditor was aware of the immoral nature of the debts before advancing the loan. See Shankar Rao v. Kamtaprasad Agrawal, A.I.R. 1947 Nag.129, at p.141, c.1; for facts and further discussion, see above pp.298-300 . It should be noted that in this case the debts were not proved to be avyāvahārika; and also there was proof showing collusion on the part of the father and his sons.

Hindu law on the subject - for it is the money-lenders in India who generally know it better than the debtors - can one imagine that he would advance money knowing that it is required for an immoral purpose? Or would any intending debtor tell his would-be creditor in so many words that he wanted the loan for paying his liquor bills or gambling debts? The question of proving the creditor's knowledge of taint as a general rule would seem to go beyond the suggestion that onus of proof should depend on the facts and circumstances of each case, and also it would seem to defeat the purpose of the doctrine of tainted debts in Hindu law if the son is made to prove the creditor's knowledge in all cases irrespective of the facts and circumstances of the cases concerned. One would think employment of such rules should be in the direction of upholding rather than defeating good laws.

However, in Doshi Jayantilal v. Luhar Amritlal[1] (1954) the Court itself raised the issue of alienee's (creditor-mortgagee's) notice of 'taint', and held that the sons must prove both the immoral character of the debt and notice of it to the alienee. Both the Lower Courts had held that the debt was illegal or immoral, and the High Court assumed that it was so tainted; but in its view the father was 'evidently in collusion with the plaintiffs and he supported their case.'[2] However, the Supreme Court[3] has said that the plaintiffs' claim "was resisted" by both the alienee and the alienor, i.e., the father. It is therefore difficult to understand the High Court's assertion of collusion.

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1. A.I.R. 1954 Sau. 36, at p.39, c.2; for facts see above pp.322-323 . As in this case, the propositions laid down in Suraj Bunsi's case were upheld in Udmiram v. Bal Ramdas, A.I.R. 1956 Nag.76, at pp.79-80. For facts and further discussion, see above pp.301-303.
2. Ibid., at p. 37, c.1.
3. See, Luhar Amritlal v. Doshi Jayantilal, A.I.R. 1960 S.C. 964, at p. 965, c.2, para. 4. The Supreme Court seems to have said nothing on this point, for, nothing is reported.

Later this decision was challenged[1] in the Supreme Court on the ground that the principles of Hindu law do not justify the view taken by the High Court that the sons had to prove the alienee's knowledge about the immoral nature of the antecedent debt. However, the Supreme Court upheld the above decision, saying that as the said propositions laid down in Suraj Bunsi's case were followed without a doubt or dissent, they should be considered as correctly representing the true position under Hindu law on that behalf; and therefore, the Court was of the opinion that it was inexpedient to reopen the question after such a long lapse of time. The Court said, "First and foremost in cases of this character the principle of stare decisis must inevitably come into operation."[2]

As regards the Supreme Court's assertion,[3] that the said propositions were followed without a doubt or dissent, it may respectfully be stated that their Lordships would seem to have been misled in coming to this conclusion. The facts would seem to present a different picture. For, since the case of Suraj Bunsi Koer to the present case of Luhar Amritlal about sixteen cases (see above pp.440-448) would seem to have dealt directly or indirectly with the proposition under consideration. In eleven of the sixteen cases, it was either referred to in passing or the views expressed by the Courts were obiter dicta; and it is important here to note that in most of these cases, it was the Court, and not the parties concerned or their advocates, that had raised the issue of proving the creditor's or purchaser's knowledge of

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1. Ibid.. For facts and further discussion see above pp.323-324.
2. Ibid., at p. 970, c.1.
3. For a considered rejection of this assertion, see J.D.M. Derrett, cit. above, 10 Luck.L.J., p. 2 and pp. 9-13.

the taint. This shows, by the way, what little importance was attached to the doctrine of notice as a defence against the doctrine of avyāvahārika debts in the legal profession itself. If it were an accepted rule of Hindu law on the subject, every Counsel for the lender or purchaser would have fought with this weapon in the interest of his client. The lawyers' non-reliance upon it, therefore, would seem to be indicative of the fact that it was not commonly so regarded as the Supreme Court has asserted it to be. Then again, of the five remaining cases in which the doctrine of notice was relied on, in one case, i.e., Krishnaji's case (1887), (see above p. 442) the Bombay High Court had merely referred to the proposition with approval without any comment or discussion, (see also Udmiram's case, f.n.1 at p.448, above), but in three others, i.e., Maharaj Singh's case (1906) (see above p. 445), Savumian's case (1914) (see above p. 445) and Lakshmanaswami's (1943), the Courts of Allahabad and Madras had declined to follow it after their considered opinion on the subject. We have already quoted these opinions above while discussing those cases. In view of the above, therefore, the Supreme Court's assertion would seem to be incorrect, and hence it follows that the propositions laid down in Suraj Bansi's case did not correctly represent the true position under Hindu law on the subject. Consequently, the application of the rule of stare decisis, in such an unsettled circumstance would seem to be erroneous; for, "It is only well established positions which are not to be upset, and not situations uneasily balanced upon precarious and possibly mistaken dicta."[1] Obviously the Supreme Court would seem to have had some doubts about the law they were laying down, for otherwise they would not have pointed towards the legislature for the correction

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1. J.D.M.Derrett, ibid., at p.2. We have also shown above at p. 440 the Privy Council's misunderstanding of the principles of Hindu law on the subject. Also see above f.n. 1 at p. 251 , where we have extensively dealt with the question of stare decisis.

of anomalies, if any, in the administration of this branch of Hindu law.[1]

The other main justification for upholding the propositions was that it was intended to protect bona fide alienees against frivolous and collusive claims made by the debtor's sons.[2]

Now looking to the facts as noted by the Supreme Court it is difficult to understand how the High Court found that the father and his sons were in collusion in this case. Not only has the Supreme Court not even mentioned any collusion in this case, but also it has positively stated[3] that the sons' claim was resisted by both respondent 1 (the mortgagee) and respondent 2 (the father-mortgagor-debtor), who pleaded that the mortgage had been executed for the payment of debts which were binding on the family. Thus both the Courts were, it would seem, directly in conflict with each other on this point.

Besides, the Supreme Court has noted[4] the fact that both the District Court and the High Court were unanimous in holding that the alienee had made no attempt to prove any enquiry on his part and we must note that even a stranger is under obligation to make enquiries, as regards the existence of any antecedent debts payable by the debtor before he enters into any transaction. One wonders how could an alienee, who did not even bother to step into the witness box to prove that he made any enquiry whatever, be regarded as a bona fide alienee?

In view of the above, it would seem that this was not a case of collusion on the part of the sons and their father nor was it a case of bona fide alienee. And, if this were so, the question of proving the alienee's knowledge would not

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1. Luhar Amritlal's case, cit.above, at p. 970, c.2.
2. Ibid.
3. Ibid., at p. 965, c.2.; also see above p. 448.
4. Ibid., at pp. 965-966.

arise at all; for such a deliberate disregard in respect of his duty to enquire would, in view of the above discussion of English cases, as well as that of Hunoomanpersaud's case, amount to mala fides on his part. Moreover the alienee's bad faith and his debtor joining him in rejecting the debtor's sons' claim would seem to amount to nothing else than collusion on their part against the sons, to rid them of their shares in the joint family property. If these findings are correct, then the Supreme Court's affirmation of the rule in these circumstances must be regarded as incorrect, for it seems to go too far.[1] The cases involving collusion on the part of the debtor and his sons in the past alone is not a sufficient justification for upholding such a rule in a case where the facts and circumstances differ completely from them. It should be remembered that even in English law the application of the doctrine of notice has been subjected to the facts and circumstances of each case (see above pp. 425-426); and therefore, it may respectfully be stated that the Supreme Court should have looked into the problem more carefully particularly in view of its own position. After all, as observed by J.D.M. Derrett, "The additional burden placed on the sons does not have the effect of preventing collusion between father and son so much as facilitate collusion between the father and the creditor, if it can be said to achieve anything at all."[2]

In Thoga v. Suresh Chander[3] (1975), although the Chief Justice had not raised the issue of notice[4] while remanding the case for retrial, both the Lower Courts differed, after finding that the debt was avyāvahārika, on the question of

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1. J.D.M.Derrett, cit.above, 'Indica Pietas', p.62; (also, we find at pp.61-62 a succinct explanation of the working of the propositions).
2. At (1964) 10 Luck. L.J., at p.13.
3. A.I.R. 1975 J. & K. 16; for facts and further discussion of the case see above pp. 306-308.
4. Ibid., see pp.16-17; incidently, this appears to show that the issue of notice as such was not considered important enough by the Chief Justice even after the Supreme Court's ruling in Luhar v. Doshi, above.

the vendee's knowledge of taint. In the end, the High Court upheld the Trial Court's finding that the vendee had no notice of the taint, and therefore the son must pay the debt even if it was tainted with immorality. Collusion between the father and his son was alleged. Leaving aside the correctness of this judgement, it may be noted that in this case the Court has at least endeavoured to lay the onus of proving the vendee's knowledge of the taint on the person who, in its opinion, could have possessed better knowledge[1] of the facts concerned. Moreover, it has, unlike the Supreme Court (Luhar v. Doshi, above), tried to take into account other relevant circumstances of the case before applying the law. Unfortunately, however, nothing is said about the vendee's duty of bona fide enquiry. This was a suit by the son, and he had proved that the debt was avyāvahārika. Upon this, one would have expected that the vendee should have proved that he was bona fide purchaser. However, application of the rule that the son must prove alienee's knowledge of taint, even before his bona fides are established, in cases of mere allegation of collusion, would seem to offer blanket protection to the alienee, irrespective of whether, in justice, he deserves it or not. True, if there was a reasonable basis for the Court to suspect collusion on the part of the debtor and his son, then, placing upon the son the onus of proving the alienee's knowledge of taint might well be justified on the ground of his fraudulent conduct, but otherwise there seems to be hardly any justification for upholding the doctrine of notice of taint in Hindu law.

However as proved in M.V. Raghaviah v. M.C. Veeriah[2] (1975), fraud or collusion may take place between a debtor and his creditor against the debtor's own son. Here, the father had sold joint family property to his brother's son

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1. Ibid., at p.17, c.2, see para. 5; also see p. 307. above. For further explanation, see Hunoomanpersaud's case at pp. 430-431, above; and J.D.M.Derrett, 'Indica Pietas', cit.above, p.60.

2. A.I.R. 1975 A.P. 350; for facts and further discussion see pp. 346-347.

under false pretences in order to defeat his own son's legitimate rights. The Court said,

> "We have already found that majority of the debts were not true and that even the true debts were Avyāvahārika and not binding on the second defendant (the son) and that in any case the first defendant (the father) himself had independent means for discharging those debts. So, there was really no necessity for selling the property. The recital itself is false. The plaintiff who is no other than the first defendant's elder brother's son, must have been in the know of things. He had been a policeman and was purchasing and selling properties. So, it can be safely assumed that he is a worldlywise person. It was well known that right from 1964 the first defendant altogether abandoned the second defendant after the death of Venkataramanamma. It is preposterous to say that the plaintiff did not know of the civil and criminal proceedings which were going on between the father and the son. What is more, those proceedings were in respect of these very lands. The second defendant in his evidence alleged that the plaintiff was actively supporting the first defendant in all these unholy activities. Be that as it may, could it be imagined even for a minute that the plaintiff did not know the serious troubles between his own paternal uncle and his son? It is impossible to give credence to the plaintiff's alleged innocence and ignorance of these matters. ... All this demonstrates beyond any doubt that the plaintiff actively colluded with the first defendant in bringing about Ex. A-1 in order to defeat the rights of the second defendant."[1]

And this need not be considered, it is suggested, as an isolated example.[2] If this is so, then the rule that

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1. Ibid., at pp. 356-357, per A.Sambasiva Rao, J., who delivered the judgement of the Court.

2. For, the characteristics of money-lenders and their accomplices have more than once been described or found to be fraudulent and crafty. See for example, Hunoomanpersaud's case, p. 418; Musst. Junnuk Kishoree's case, at pp.222-223; Bhawani Bakhsh's case, at p. 223; Maharaj Singh's case, at pp.544-545; even the facts in Udmiram's case, would seem to be of this nature; see, A.I.R. 1956 Nag. 76, at pp.77-78; all these cases have been discussed above.

to succeed, a Hindu son must prove not only the tainted nature of his father's debt but also the lender's or alienee's knowledge of the taint, irrespective of whether or not the defendant was a bona fide lender or alienee, would seem to go not only far beyond its intended purpose, but also would apparently lead to effectively nullifying the express provisions of Hindu law - the purpose of which is undoubtedly, morally or otherwise, not only reasonable but necessary for orderly living and development of the society as a whole. For, the doctrine of avyāvahārika debts is basically meant to benefit society and not only the sons of a Hindu father.

Then again, have the principles of equity such an overriding authority even in English law as to interfere with legal provisions? In view of their role in English law (see above p. 428), one would not think so; and if the same were to be applied in Hindu law too, equitable principles should, it seems, do the same. It would appear, therefore, that so long as both the śāstras and modern courts of law hold that a Hindu son is not bound under Hindu law to pay his father's tainted debts, neither the doctrine of bona fide lender or purchaser, nor the doctrine of notice should be allowed, as a general rule, to alter the legal position except, perhaps, where the son was party to a deliberate fraud against his father's creditor etc.. Hindu law does not protect such fraudulent gains, and, therefore, it would seem appropriate even in view of Hindu law, if the application of the doctrine of notice is strictly confined to cases of proved (or strongly suspected on reasonable evidence) collusion between the father and his son in fraud of his creditors or alienees.

Conclusion: Not only śāstras but also the Supreme Court of India, and of course all other Courts in India, state even today that 'tainted' debts of the father do not bind his sons under Hindu law. On the other hand, as we have seen above, the effect of the doctrines of bona fide purchaser

and notice of 'taint' has been, in the ultimate analysis, to nullify this position. Looked at from this angle, the Privy Council would seem to have erred in Suraj Bunsi's case in drawing the said propositions: that in order to escape liability the son must prove both the tainted nature of the debt of his father and the purchaser's notice thereof (see above p. 438); for, as shown above (at p.440), it failed to realise the consequences of the propositions upon Hindu law. The rule in respect of precedents has further complicated the legal position. Neither the Courts, nor the legal profession, appear to be sure as to the exact place of the doctrine of notice in Hindu law.[1] The Supreme Court itself would seem to have been uneasy while affirming this doctrine; for, on the one hand, its reasoning would hardly seem to convince (see above pp. 448-452); and on the other hand, it has almost nervously pointed towards the Legislature for correction of anomalies, if any. The anomaly referred to is apparently this: that though under the doctrine of pious obligation the son is not bound to pay his father's 'tainted' debts, by application of the doctrine of notice he would nevertheless be forced to pay such debts if he failed to prove that the lender or purchaser knew that the debts were incurred for tainted porposes. No doubt, this is contrary to Hindu law. The situation, therefore, raises the question: Is there any scope for the doctrine of notice of taint in modern Hindu law?

The Privy Council has referred (see above p. 432) to the fact that the lender would have hardly any control in most cases over actual spending of the money advanced to his debtor. In addition to this, the Hindu law position that the concept of tainted debts has reference only to improprieties of the father's conduct, would apparently leave some scope for fraud and cheating against creditors etc.. In the interests of justice, one is bound to feel

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1. For a similar view see J.D.M. Derrett, cit.above, 'Indica Pietas', pp. 63-64.

sympathetic towards victims of cheating or fraud by the father (debtor). However, so long as the doctrine of avyāvahārika debts remains a part of modern Hindu law, in cases where it is proved that the father incurred debts for an immoral purpose, his son would have to be freed, it seems, from his liability under the doctrine of Pious Obligation[1] in spite of the suffering of an innocent party.[2] This may seem 'legally' just, but the fact that an innocent party such as, for example, a stranger auction-purchaser, would suffer under the circumstances is apparently far from 'righteous'. In order to mitigate such suffering, therefore, we may agree with J.D.M.Derrett when he says,

> "Where the purchaser of joint family property is the creditor he is fully apprised of the circumstances and is able to bring facts within

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1. For similar views, see J.D.M. Derrett, cit.above, at 10 Luck. L.J., p.4; also see "If the debt was incurred by the father clearly for an immoral purpose, there can, of course, be no pious duty on the part of the son to discharge it, that is, no pious duty legally recognisable." per Stuart, C.J., in Mahabir Prasad v. Basdeo Singh, cit. above, (see p.371) at p. 241. Also see observations of Patanjali Sastri, J., (quoted above at p.447) according to which excepted debts are solely based on impropriety of the father's conduct and have no reference to propriety or otherwise of the creditor's conduct in advancing the loan.
   It may also be pointed out here that even in English law of equity and trusts the doctrine of bona fide purchaser was not considered as an absolutely universal rule. For, exceptions were made in respect of claims of a judgement-creditor, who had no notice of the plaintiff's equity; and in cases where claims were made against the claims of a dowress. - See J.Story, cit.above, at p. 266, f.n.3 and cases cited there.
2. Such suffering of an innocent party was not unknown even in English law, from where the doctrine of notice has been imported: see, for example, Kennedy v. Green, discussed above at pp. 413-415, at p. 415 ; also see f.n. 3 at p. 415.

> his knowledge to the notice of the court. Therefore proof of taint alone is sufficient to release the sons' interests from the effects of the court sale. But when the purchaser is a stranger to the suit, his equities are at least as good as the sons', and unless they prove that he knew of the taint, or could have known of it, i.e., that he knew all along that they were not really liable, or rather that he was not a bona fide purchaser for value without notice of the father's defective power to bind his sons, and therefore of the court's defective power to sell the sons' interests, they must suffer him to retain the whole property, including their interests."[1]

If the son could prove that the auction-purchaser was in collusion with the father, he would save his interest in the joint family property. On the other hand, however, if it is proved that the son was in collusion with his father in fraud of his lender or a subsequent alienee of the father, then - and in such circumstances only - the son might justly be made to prove not only the tainted nature of the debt, but also the lender's or purchaser's knowledge of the taint for escaping his own liability. For such an exception to the doctrine of avyāvahārika debts might be justified in view of the practice followed by the Orthodox Hindu Courts (see above p.227, f.n.1) according to which not merely the terms of the law but also its spirit must be looked into, in the context of the facts and the circumstances of the case concerned, so as to serve the interest of justice. In other words, the Court was prepared to make an exception to general rules if justice demanded it in an appropriate case. Moreover,

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1. J.D.M. Derrett, C.M.H.L., cit.above, p.107. Also see, "A security which is given in respect of a debt arising out of an illegal transaction is tainted with illegality, and cannot be enforced, whether it is under seal or not, if it was taken by a person who knew, or ought to have known, of illegality." Halsbury's Laws of England, vol.8, p.152, sec. 259; see also above, p. 427, f.n. 5.

fraudulent gains from innocent people have nowhere been condoned by Hindu law, and if such an exception is made in order to prevent frauds or cheating on the part of the father and his son it would seem to fit into the spirit of Hindu law, because the purpose of the doctrine of avyāvahārika is certainly not to facilitate defrauding or cheating of others either by the father or by him and his son. However, the exception must not be allowed to become the rule while the doctrine of avyāvahārika debts exists in Hindu law.

CHAPTER VIII

C O N C L U S I O N S

It emerges from this study that the śāstric information on the Pious Obligation and the doctrine of 'tainted' debts was not law in the modern Western sense. It is not possible however to argue that both these śāstric rules were invariably enforced; nor can one argue that they were never enforced - still less that they were unenforceable.

The main concern of the śāstric precepts was upholding and preserving dharma, i.e. righteousness as conceived by the śāstras. The śāstras dealt with life as a whole, and therefore, in order to grasp properly the significance of the śāstric precepts it was necessary to view them in a wider context. It seems that the śāstric approach was properly understood by the orthodox Hindu Courts, for they appear to have dealt with such precepts in a flexible way having regard to the facts and circumstances of the case concerned. However, the system lacked uniformity and certainty.

On the other hand, due to the circumstances then prevailing, the British scholars and judges mistakenly took these precepts for legal principles because of their similarity to certain concepts of Canon law already known to them; and later on whenever they were faced with problems of construction or application of the precepts, they were obliged to rely on those concepts from their own laws due to their inadequate knowledge of the śāstras. Obviously, those concepts, as we have seen in chapters 5-7 above, have affected both the meaning and scope of the precepts concerned. Moreover, in order to achieve uniformity and certainty, the flexible approach of the orthodox Hindu Courts while dealing with such precepts (as found in the mahajaras etc.) was replaced by a more refined but comparatively rigid system of piece-meal application under which, speaking generally, the modern courts of law not

only construed such precepts in a narrow context, but also applied them more rigidly under the doctrines of 'precedents' and 'stare decisis'.

These changes would seem to have occurred in spite of the Privy Council's warning, as far back as 1856,[1] that the rules of construction developed for the purpose should be applied in the context of the facts and circumstances of each case, as the rules were not rigid but only basic.[2] Consequently, we find that in a number of cases discussed above the form or procedure rather than the substance of the case concerned has dictated the course of the decision. Apparently, this tendency has led to certain anomalies,[3] and the rules of 'precedents' and 'stare decisis', though introduced with good intentions, have helped to perpetuate such anomalies. The Supreme Court's decision in Luhar v. Doshi[4] has undoubtedly put in jeopardy the future of the doctrine of 'tainted' debts and that of the Pious Obligation.

Consequently, as we have clearly demonstrated above (see chapters 6-7), the law relating to these doctrines is hardly settled. In fact it is ambiguous and enmeshed with anomalies even to this day. This kind of legal situation can hardly be described as conducive for proper administration of justice in respect of the doctrines under consideration, particularly in view of their close connection.

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1. Hunoomanpersaud's case, see above p. 431.
2. Hemraj v. Khemchand, see above p. 233.
3. See above p. 391 ff.
4. A.I.R. 1960 S.C. 964, see above pp. 405-406.

In the end, if the legal situation persists as it presently is, the public is bound to suffer. So, in order to alleviate the situation, can we, having regard to the present social and legal conditions, offer any practical solutions in the light of our investigation?

We have stated above (see p. 397) that the whole problem can only be solved by asking two questions: (i) what is the orthodox Hindu scriptural teaching on the son's liability to make good his father's debts? and (ii) does this still apply under modern social, economic and legal conditions?

According to the scriptures the son is expected to make good his father's just debts in order to save his father, after his death, from punishment in a future state for non-payment of such debts. Also, they say that both merit and demerit were transferable from one person to another (see above pp. 37-4o); and yet the śāstras have excluded the father's 'tainted' debts from his son's liability.

In this connection, we have observed (see above p. 393) that the mīmāṁsā concept, that a man's issue etc. are not tainted with his crimes or unrighteous acts, on the principle that a man's own karma must be worked out by him so that it is only his just debts which burden his sons, etc., is responsible for the characteristic dharma-śāstra position on our subject.

However, we also recollect that the mīmāṁsā position was not de facto paramount in Hindu society. Manu's text gives examples of other views, namely that dharma and adharma are, as it were, assets and liabilities which can be shared. Inscriptions again and again assure us that

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1. Manu VII.28, see above p. 393, f.n. 1. For further information, see above pp. 4o-41.

those who divest or confiscate charities will afflict with sin past and future generations. Hence the Hindu public has not been faithful to the mīmāṁsā concept: there was no reason why it should be. Mīmāṁsā is one of the intellectual sources of dharmaśāstra, but it is only one of many equally valid philosophies.

Thus, through the ages, the concept that a man's sons must share his demerits has found acceptance de facto. And these are aspects of Hinduism which cannot be ignored in the law-courts. To impose philosophical notions which the public do not accept in practice is an error, as was recognised in the Supreme Court in the great case[1] concerning payment of income-tax by idols wherein the mīmāṁsā doctrine was fully enunciated, but rejected as inconsistent with received practice.

In view of the above and having regard to a number of instances taking place in actual practice wherein, without any intervention of the law-courts, Hindu sons do in fact pay not only just debts but also 'tainted' debts of their father, we might be correct in saying that if it is an accepted Hindu philosophy that a man's sons must share his demerits, and if in fact they do share them, then, it is only logical that they may legally be held liable to share his 'tainted' debts, too.

On the contrary, one might argue that the scriptural teaching on our subject also reflects the society's disapproval of immoral or unrighteous acts on the part of the father, and that this kind of drastic change in the law on the subject would undermine the śāstric teaching and also encourage immorality and unrighteousness in the society. Now, in view of our discussion of so many cases of the fahter's immorality, etc. one wonders how many fathers

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1. Jogendranath Naskar v. Commissioner of Income-Tax, A.I.R. 1969 S.C. 1089, at 1091.

were deterred by the presence of the doctrines under consideration. It is difficult to completely disagree with such an argument, for the deterrance envisaged in such cases is always an unknown quantity. But the fact that many fathers, in spite of the presence of these doctrines, still go on leading immoral, etc. lives in the society and incur debts for the purpose shows quite clearly that the doctrines have had little effect, if any.

Perhaps the śāstras were right in those days, and the judicial system under orthodox Hindu Courts may have been more effective in administering the law on our subject, but India has changed since then,[1] and is undergoing change even today so far as its social, economic and legal structure is concerned. In view of this change (see below), it may be observed that the failure to achieve what the śāstrakāras - and we may add even modern courts - seem to have hoped for from the doctrines of 'tainted debts' and the Pious Obligation appears to lie in the fact that the enforcement of morals through modern civil law is rarely effective, and sometimes it can be counterproductive, for, instead of promoting morality, as we have seen above in cases particularly on criminal misappropriation (see pp. 37o-375), it may frequently encourage roguery.[2]

The change that is taking place in modern society in India may have been unimaginable in the days of the śāstra-

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1. For details regarding the changes in socio-religious and legal framework in India, see J.D.M. Derrett, R.L.S.I., cit.above, chapters 12-13, pp. 4oo-481. Also, the Supreme Court has acknowledged the changing situation in the case of Jakati v. Borkar, see above, p. 383.

2. For a similar assertion see P. Devlin, The Enforcement of Morals, (Oxford, 1965), pp. 52-55. The author has discussed the problem of the enforcement of morals through the civil law, and has come to a conclusion in these words, "These legal attitudes promote neither morality nor obedience to the law. On the contrary they shock the conscience and reward knavery." (at p. 55).

kāras. Although traces of the caste-system etc. are still very much alive, it cannot be denied that the forces of change are at work. In these days, if we visit a factory, an office, a school or college, a restaurant, or travel by Indian railways, for example, we will see people not only of various castes but also of different religions working, learning, dining and travelling together. In fact, even intercaste or inter-religious marriages have become, though not common, tolerable in the modern society. And, in order to encourage this trend, it seems that the Constitution of India has, unlike the śāstras, laid down a legal framework[1] in that all the people are generally assured of equal treatment before the law and any discrimination on grounds of religion, race, caste, etc. is prohibited. 'Untouchability' is abolished and its practice in any form is forbidden. Moreover, by Article 44, the Constitution has directed that "The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." (My emphasis).

The need for a uniform civil code is all the more enhanced by the rapid development in the economic life of the country, for, huge modern industrial, commerical and financial institutions involve people of various faiths and races. In such circumstances, it would seem to be unjust and discriminatory to have one law for Hindus and others for Muslims or Christians or Parsis. All things being equal, can a bank be sure presently of recovery of its loan from a Hindu father as compared to a father of any other faith? In view of the doctrine of 'tainted' debts in Hindu law, it cannot be absolutely sure for obvious

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1. Apart from Preamble of the Constitution, Articles 14-17 may be referred to in this connection.

reasons. As J.D.M. Derrett[1] has pointed out, the situation is more likely to lead to distrust in a Hindu father's credit-worthiness. In the wider sense, therefore, the situation is a handicap not only to Hindus but also to the economic development of the country as a whole.

Thus, having regard to the scriptural teaching on sharing of the merits as well as the demerits of one person by another, the failure on the part of the civil law in enforcing morals, the provision of the Constitution of India in respect of a uniform civil code for all Indians, and the appropriate social, economic and legal needs[2] of the country, we may respectfully suggest that

(1) The Parliament should abolish the doctrine of 'tainted' debts and detach the doctrine of Pious Obligation from its spiritual and sociological foundations, so that all the debts of the father would be recoverable from the joint family property, whether or not 'tainted' in the traditional or any other sense.[3]

However, in the meantime, it may be recommended that

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1. "The question of 'taint', especially as misconstrued recently in the Indian Supreme Court, leaves uncertainty in the mind as to which debts, subject to which conditions, will be binding upon the sons." See 'Indica Pietas', cited above, p. 63.

2. As an example, we may cite The Untouchability (Offences) Amendment and Miscellaneous Provision Act, 1976 (Act 1o6 of 1976). By sec. 13 the State Government is empowered to impose collective fines on inhabitants of an area concerned (including a Hindu undivided family).

   Apparently, the enactment is in pursuance of the Art. 17 of the Constitution, which has abolished 'untouchability'. The objective of the Act could hardly be achieved if, for example, Hindu sons would be allowed to avoid the liability under the doctrine of 'tainted' debts, which includes 'fines'. Thus, it is clear that in order to meet present legal needs personal laws may have to give way in the wider interest of the country.

3. For a similar view, see J.D.M. Derrett, 'Indica Pietas', cit. above, p. 64.

(2) The Supreme Court should, at the first available opportunity, rectify its own error[1] as regards the application of the doctrine of notice along the lines suggested in the conclusion of the chapter VII (see pp. 455-459), i.e. in order to escape his liability under the Pious Obligation, it is necessary for the son to prove the tainted nature of his father's debt; but he would be required to prove not only the tainted nature of the debt but also the lender's or purchaser's knowledge of the taint only if there was collusion on the part of the father and his son, or where the purchaser was a bona fide stranger.

(3) In the light of our discussion of the anomalous legal position in respect of the present dichotomy between the father's criminal acts and civil acts (see above pp. 391-397), we may respectfully submit that the Supreme Court should, as it has done in the past,[2] reconsider the whole

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1. In Luhar v. Doshi, A.I.R. 1960 S.C. 964,

> "The Supreme Court's slip was per incuriam, and therefore is not really binding upon any inferior court, still less upon the Supreme Court itself. The error must be rectified because sons' interests must be protected against a sale to pay for liabilities which actually are avyāvahārika, notice or no notice."
> J.D.M. Derrett, C.M.H.L., cit. above, p. 108.

2. In this connection see Guramma v. Mallappa, A.I.R. 1964 S.C. 510. In this case, a gift of land to a daughter was involved. Here

> "Features of śāstric law not to be found in the Mitākṣarā were resurrected, and it was held that gifts to daughters in performance of the duty to see to their welfare even after their marriages were valid and binding on coparceners (their brothers and others) on the footing that in ancient times the daughters might have demanded (according to some authorities) an actual share if they were not married by the time a partition took place, a right virtually obsolete and almost unknown to the Anglo-Hindu law."
> Ibid, p. 91.

legal position in the light of śāstric theory and actual practice, having regard to accepted philosophical notions amongst Hindus on the one hand, and the circumstances prevailing today on the other.

(4) Alternatively, a choice must be made by the Supreme Court between the abundantly documented viewpoints:

(a) Where the father becomes a debtor at the moment of a grossly immoral or illegal act, the son is not liable even if an innocent third party is put to loss (see above p. 397), and

(b) Where the father's illegality, immorality or crime succeeds, even momentarily, his civil indebtedness, the son is liable and the third party may be compensated at his expense.

(5) For the purpose of proper administration of justice, the courts in general may be reminded by the Supreme Court that the rules of construction etc., applicable to cases involving the doctrines under consideration, should be applied with reference to the facts and circumstances of the case concerned. The flexibility inherent in this warning is essential in view of the indefinite nature of the doctrine of 'tainted' debts. If the judges would use their discretion appropriately, at least some ill-effects of the anomalies referred to above could be avoided in the future.

Finally, it is necessary to emphasize that the theme of this research, namely, the doctrine of 'tainted' debts in the context of the son's liability under the doctrine of Pious Obligation, has been examined in the light of the Dharmaśāstra and Arthaśāstra, as expounded by their commentators and digest-writers, as well as modern scholars and the judgments of the modern courts of law.

In addition to the scope of this investigation, we remain aware of the existence of other avenues of research which would fruitfully be explored. Noteworthy among these are the mahajaras and inscriptions, which, although rich in relevant material, lie outside the brief of the present study. These would repay close legal analysis in the future.

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A P P E N D I X I

SURETYSHIP DEBTS

A.I.1 Introduction

A.I.2 Suretyship debts and the liability of the surety's sons

(a) The Dharmaśāstra view

(b) Cases concerning surety debts

A.I.3 Conclusion

SURETYSHIP DEBTS

A.I.1 INTRODUCTION

Suretyship in general has been discussed by various writers.[1] However, our purpose is different from theirs. We are concerned, here, only with the Hindu son's liability

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1. P.V.Kane, cit.above, H.Dh., III., pp.435-438 and pp.446-448. Kane discusses here main points in outline, including the sons' liability;

   L.S.Joshi, Dharmakośa, vol.I, pt.2, (Wai, 1938), pp.661-667 which contains the smṛtis and extracts from commentaries upon them on the subject at length; and at pp.667-715, we get informiaton, among others, on sons' liability to pay his father's suretyship debts;

   H.T. Colebrooke, cit.above, Digest, vol.I, pp.226-262. The discussion on the subject here is ample and sufficient.

   J.Jolly, Recht und Sitte, (Strassburg, 1896), translated into English by B.Ghosh, Hindu Law and Custom, (Calcutta, 1928), pp.221-223; K.P.Jayaswal, Manu and Yājñavalkya, (Calcutta, 1930), 200-202; Balkrishna, Sir Asutosh Memorial Volume, (Patna , 1926-28), pp.286-287; P.N.Sen, The General Principles of Hindu Jurisprudence, (Calcutta, 1918), 320-323; N.C.Sen-Gupta, cit. above, Evolution of Ancient Indian Law, 238-239; all these have mentioned the subject very briefly.

   L.Sternbach, Juridical Studies in Ancient Indian Law, I, (Delhi, 1965), pp. 153-198. We have here a long and detailed discussion on the topic. The responsibility of sons for sureties' obligation is discussed at pp. 186-195;

   H.N. Chatterjee, Law of debt in Ancient India (Thesis, D.Phil., Oxford, 1969), pp. 169-258. The subject is treated here quite at length and in a systematic manner.

   J.D.M.Derrett, 'Suretyship in India: The classical law and its aftermath'; (Recueils de la Société Jean Bodin, XXVIII, 1974, 389-421, or see J.D.M.Derrett, Essays in Classical and Modern Hindu Law, vol. 1, (Leiden, 1976), 227-259. This contains not only a critical discussion on the subject, but also its evaluation in comparison with certain other contemporary legal systems.

to pay his father's suretyship debts. This question is mentioned in almost all the smṛtis,[1] but there appears to be a difference of opinion among them. For

> "some of the sources, as G.,[2] Vas. and K.,[3] were of the opinion that the son was not liable to pay the surety-money; Mn., Y. and Vi. declared that the son had to pay the surety-money in the case of surety for payment only; Brh. and Kāty. also in the case of sureties for delivery of assets; Vyāsa's opinion was that the son was always liable to pay the surety-money."[4]

We have to examine, therefore, these various views in the light of the commentaries upon them, and try to ascertain,

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1. Gautamadharmasūtra, XII.38, q. in Dharmakośa, op.cit., p. 677; or see G.Bühler's Trans., Gautama, XII.41, S.B.E., II, (Oxford, 1879), p. 241; Vasiṣṭha, 16.26, Dharmakośa, op.cit., p.678; or Vasiṣṭha, XVI.31, G.Bühler, Trans., S.B.E., 14, (Oxford, 1882), p. 82. Also see Manu, VIII. 159,160 and 162; Yājñavalkya, II.53-54; Kauṭilya, 3.11.18, 3,16.9; Nārada, 4.10. It may be noted here that Sternbach, op.cit., appears to suggest at p.186, f.n.55 and at p.190, f.n.61, that Nārada did not mention this subject, i.e., son's liability, which seems to be incorrect (see Aparārka on Yājñavalkya, II.47, A.S.S.46, pt. II, (Poona, 1904), p.648; and Dharmakośa, op.cit., p.695); Bṛhaspati, XI.41, 51, according to J.Jolly's trans., S.B.E.33, (Oxford, 1889), pp.327 & 329 respectively; or Bṛhaspati, X.118, as q. by Sternbach, op.cit., p. 187; also q. in Dharmakośa, op.cit., p.671; Kātyāyana, 534, P.V. Kane, ed.& trans., cit.above, Kātyāyanasmṛti, pp. 67, 223; Vyāsa, Dharmakośa, op.cit., p. 676; q. in the Vivāda-ratnākara, cit.above, p.44; the Smṛticandrikā, cit.above, p. 354; Aparārka (on Yājñ. II.53), op.cit., p. 656; Viṣṇu, VI.41, vide, J.Jolly, trans., cit.above, S.B.E.7, p. 46.

2. G. - Gautama; Vas. - Vasiṣṭha; K. - Kauṭilya; Mn. - Manu; Y. - Yājñavalkya; Vi. - Viṣṇu; Brh. - Bṛhaspati; Kāty. - Kātyāyana; see Sternbach, op.cit., Abbreviations, pp.1-23.

3. Cf. Kauṭ. 3.11.18, wherein he states, "Sons and grandsons shall bear liability for suretyship concerning life, marriage or land to which no restriction as to place or time applies"; vide R.P.Kangle, cit.above, trans., p.263.

4. L.Sternbach, op.cit., p.186.

as far as possible, the nature of suretyship debt so as to determine whether its inclusion into the category of 'tainted debts' is justifiable from the śāstric point of view.

Definition of suretyship: Before we ascertain the nature of suretyship debts, it is essential that we should know its meaning and very briefly investigate the various kinds of sureties which existed according to the śāstrakāras.

Vijñāneśvara (c. 1125) defines suretyship thus: prātibhāvyaṃ nāma viśvāsārthaṃ puruṣāntareṇa saha samayaḥ / [1] That is to say that, "Prātibhāvyaṃ, suretyship, is a contract with another person with the object of creating confidence."[2] Although this translation appears to give the gist of the definition, it is literal and hence unclear. H.N.Chatterjee[3] puts it, "Suretyship stands for a contract or agreement with a person (other than the debtor) for creating confidence (in respect of the safety and security of the capital invested as a loan)." This translation seems to confine itself to suretyship in respect of debts only. But, in view of Vijñāneśvara's treatment of the term, particularly in the context of his explaining the three main kinds of suretyships, it appears to be a narrow one. Moreover, the second party in respect of suretyship, need not necessarily be 'the debtor'. J.D.M. Derrett seems to have overcome this deficiency when he translates this definition as, "the word suretyship means the contract or agreement with a third party which has as its object (or 'for the purpose of') confidence (in the second party)".[4] According to Sternbach, however,

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1. The Mitākṣarā on Yājñ.II.53, B.S.Moghe, trans., Yājñavalkya-smṛti Mitākṣarā Vyavahārādhyāya, (Bom., 1879), p.116. Also, see P.V.Kane, cit.above, H.Dh., III, p.436, f.n.726. J.H.Dave, ed., Pṛthvichandra's Vyavahāraprakāśa,(Bom., 1962), p.225; V.P.Bhandari, ed., the Vīramitrodaya-Vyavahāra-prakāśa, (Benares, 1929), p.247.
2. J.R.Gharapure, trans., cit.above, Yājñavalkya-Smṛti, vol.II, pt.III, p.808.
3. cit.above, p. 175.
4. J.D.M.Derrett, 'Essays', cit.above, pp. (231-32).

> "this definition (of Vijñāneśvara) is not detailed enough. From the point of view of ancient Indian law, the contract of suretyship should be defined in the following manner: contract of suretyship is a contract whereby a man binds himself to be personally answerable for obligation of another as an accessory debtor, in addition to the person principally liable." [1]

But he himself (at p. 163) appears to contradict his own definition when he denies that the surety is an accessory debtor, saying that he (the surety) is liable only if the principal debtor does not repay the debt.[2]

With regard to the above criticism of the definition given by Vijñāneśvara, J.D.M. Derrett observes,

> "... jurists like Vijñāneśvara were highly trained minds, and versed in logic, whence it follows that the definition is deliberate. Now, it follows that the classical definition insists upon aspects which Sternbach would not necessarily see as uppermost: Firstly, prātibhāvyam is the actual contract itself, and not an abstract notion. There is a suretyship when an agreement to answer, if necessary, for another man's obligation is still valid and binding. Secondly, Sternbach's intrusion of the word 'personally' could give rise to misunderstandings. If anything is clear it is that the surety's obligation does not necessarily die with him (as Sternbach fully explains in his article), and, moreover, the obligation attaches to the surety's property - indeed, without the liability of the surety's property (the surety, as we shall see, should be an independent, rich man) the institution of suretyship is a mockery. Next, the classical definition insists that the institution exists for the purpose of

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1. L.Sternbach, cit.above, p.23; also see, J.D.M.Derrett, ibid.
2. Also see, J.D.M.Derrett, ibid., f.n.7; here, J.D.M.Derrett observes, "the document Lekhapaddhati (ed. C.D.Dalal and G.K.Shrigondekar, Gaekwad Or. ser., 19, Baroda, 1925), at pp.19-21 in our Appendix would make the sureties liable along with, or rather indistinguishably from the principal debtor. The general law would seem to have been that the liability of a surety was conditional upon the principal's default". See p. (232).

> inducing confidence: and there can, therefore, be a suretyship in the eyes of the Hindu jurists though no definite or even envisaged obligation is in question at the time of the agreement. As we shall see, the Hindu jurist was interested in the confidence aspect rather more than in the debt aspect: though this is not to suggest that there was any defect in the agreement - evidently there was no suretyship without an explicit undertaking to indemnify the third party in case the confidence should turn out to be unjustified. And this would apply with equal force and with equal validity whether the confidence turned out to be unjustified by chance, misfortune or fraud: what is in view may as well be speculation as a normal business undertaking. The institution of suretyship existed to enable risks to be taken, and not only risks in respect of the second party's honesty and integrity."[1]

Thus, it appears from the above discussion that suretyship, as envisaged by the śāstra, may mean an agreement between the surety and a third party mainly for the purpose of inducing confidence in respect of the second party, who might be, among other things, an intending debtor. We may turn, now, to the kinds of sureties available according to the śāstras.

The classification of sureties: A person may stand as a surety for another in several ways, and hence the śāstrakāras mention several kinds of sureties. Thus, Manu speaks of only two kinds of sureties: 1. for appearance,[2]

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1. Ibid., pp. (232-33).

2. Yo yasya pratibhūs tiṣṭhed darśanāyeha mānavaḥ /
adarśayan sa taṃ tasya prayaccet sva-dhanādṛṇam //
Manu, VIII.158, vide Dharmakośa, op.cit., p. 662; G.Jha, cit.above, trans., Manusmṛti, vol.IV, pt.1, p.201; and his H.L.S., p.180; H.T.Colebrooke, cited above, p.243.

and 2. for payment;[1] whereas Yājñavalkya,[2] Nārada,[3] Viṣṇu[4] and Medhātīthi[5] on Manu, VIII.158 refer to three kinds of sureties, adding one more to the above list of Manu, namely the surety for confidence; Bṛhaspati[6] adds a fourth one: surety for delivering the assets. It is said that "there is not much difference between payment and delivery of assets which are separately mentioned by Bṛihaspati."[7] This is,

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1. Darśanaprātibhāvye --- / dāna pratibhūvi prete dāyādānapi dāpayeta // Manu, VIII.160; vide Dharmakośa, op.cit., p. 664; G.Jha, Manusmṛti, op.cit., p.203; G.Jha, H.L.S., pp. 185-186.

2. Darśane pratyaye dāne prātibhāvyaṃ vidhīyate / Yājñ.II.53, cit.above, see f.n.6; also see Dharmakośa, op.cit., p.665; G.Jha, H.L.S., op.cit., p.177; V.P.Bhandari, ed., the Vīramitrodaya, Vyavahāra-prakāśa, (Benares, 1932), p.248; H.T.Colebrooke, op.cit., p.239.

3. Upasthānāya dānāya pratyayāya tathaiva ca / trīvidhaḥ pratibhūrdṛṣtastriṣve vārtheṣu sūribhiḥ // Nārada, 4/118; Dharmakośa, op.cit., p. 669; H.T.Colebrooke, op.cit., p.237.

4. Darśane pratyaye dāne prātibhāvyaṃ vidhīyate / Viṣṇu, 4.41; Dharmakośa, op.cit., p. 662; J.Jolly's trans., cit.above, S.B.E.7, p.46.

5. Medhātīthi on Manu, VIII.158, vide G.Jha, Manusmṛti, op.cit., p. 201.

6. Darśane pratyaye dāne ṛṇidṛavyārpaṇe tathā / catuṣprakāraḥ pratibhūḥ śāstredṛṣto manīṣibhiḥ // Bṛ.XI.41; Dharmakośa, op.cit., p. 671; Bṛ. q. in the Vīramitrodaya, op.cit., p. 247; J.Jolly, trans., cit.above, S.B.E.33, p. 327; G.Jha, H.L.S., op.cit., p.178; H.T. Colebrooke, op.cit., p.233; P.V.Kane, cit.above, H.Dh., III, p.436, f.n.727; Bṛ. q. by Aparārka on Yājñ.II.53, cit.above, A.S.S.46, pt. II, p.655; Bṛ. q. in the Smṛticandrikā, Vya.-kāṇḍa, II., p.148; vide J.R.Gharpure, trans., (Bombay, 1950), p.276; P.N.Sen, The General Principles of Hindu Jurisprudence, (Calcutta, 1918), p.320; R.K.Ranade, (1950), Bom.L.R., J., p.81; G.Jha, Trans., the Vivāda-cintāmaṇi, (Baroda, 1942), p.22; P.D.Vidyalankara, ed., The Vivāda-ratnākara, (Calcutta, 1887), p. 40.

7. R.K. Ranade, op.cit., p. 82.

however, a debatable point.[1] To these four kinds, Hārīta[2] adds a fifth: a surety for fearlessness; Kātyāyana[3] increases the list by two more terms: a surety for carrying out proceedings and a surety for swearing. Vyāsa[4] and Pitāmaha[5] add the eighth type of surety called a surety for presentation of the delivered pledge. Kauṭilya, like Gautama and Vasiṣṭha, does not directly give us any list, but, by implication, he seems to refer to the surety for payment,[6] that for safety of life, surety in respect of return of land by tenants and that concerning marriage.[7] Also, according to the Vivāda-

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1. According to the Vivāda-cintāmaṇi, op.cit., p.22, these seem to differ in that the payment is giving from one's own, while restoring means returning a thing to him from whom it was borrowed.

2. Abhaye pratyaye dāne upasthāne 'rthadarśane /
pancasveṣu prakāreṣu grāhyohi pratirbūdhaiḥ //
Hārīta q. in G.Jha, cit.above, H.L.S., p.178; Dharmakośa, cit.above, p.661; also, q. in the Smṛticandrikā, op.cit., p. 148.

3. Dānopasthānavādeṣu visvāsa-śapathāya ca /
lagnakaṃ kārayed evam yathāyogaṃ viparyaye // Kāty.,530.
P.V.Kane, ed.& trans., cit.above, Kātyāyanasmṛti, pp.66, 222; q.by Aparārka on Yājñ.II.53, op.cit., p.655; H.T.Colebrooke, cited above, p.239; G.Jha, cit.above, H.L.S., p.178; quoted also in the Smṛticandrikā, op.cit., p.148; The Vivāda-ratnākara, op.cit., at p.41 seems to read 'dāpayet' for 'kārayet'; The Vivāda-cintāmaṇi, op.cit., pp.22-23; Dharmakośa, op.cit., p.673.

4. Lekhye 'kṛte ca divye vā dānapratyayadarśane /
gṛhītabandhopasthāne ṛṇidravyārpaṇe tathā // Vyāsa;
q. in Dharmakośa, op.cit., p.676; The Smṛticandrikā, op.cit., p.148; G.Jha, H.L.S., op.cit., p.185.

5. Ādhipālakṛtastvādhirmitakālopalakśitaḥ / na cetsa
dhanine dattastasyādhestaiḥ samrpaṇaṃ // Pitāmaha
Dharmakośa, op.cit., p.675; The Smṛticandrikā, op.cit., p.150; G.Jha, H.L.S., op.cit., p.182.

6. Kauṭilya, 3.11.14 reads 'pretasya putrāḥ--- pratibhuvo vā' / vide R.P.Kangle, cit.above, ed., Kauṭiliya Arthaśāstra, I, p.113; and trans., II, p.262.

7. Jīvita-vivāha-bhūmi-prātibhāvyaṃ --- vaheyuḥ / Kauṭ.3.11.18 ibid., I., p.113; and ibid., II., p.263, f.n.18;
For various interpretations of the above see Sternbach, cit. above, pp.189-90, f.n.60, and Derrett, cited above, f.n.7.

ratnākara of Caṇḍeśvara, a surety should be demanded in cases where there is a possibility of breach of faith.[1] Thus, the number of sureties is likely to increase with the increase in the number of situations involving a possibility of breach of faith. We should note, however, that this classification appears defective in that it seems, at least in some cases, more artificial than real: take, for example, the case of the surety for delivery of assets (Bṛhaspati) and that for presentation of the delivered pledge (Vyāsa and Pitāmaha). If we look at the basic nature of the surety (guarantee) required in both these cases, there seems hardly any difference. In these cases, it is not the ownership of assets nor the pledge that matters, but the purpose for which the surety is sought and given. Thus it is the delivery of goods (assets or pledge) involved which is assured, and from this point of view there need not be any distinction between the two. Looked at from this angle all those sureties which assure doing of an act (such as swearing or carrying out proceedings or performing an ordeal etc.) or otherwise, on the part of the second-party, may be placed in one class.

It may also be noted that there seems no uniformity of opinion among the śāstrakāras as regards the classification of sureties. The number of sureties mentioned by them seems to vary. Thus, Vyāsa names seven sureties,[2] Kātyāyana mentions numbers 1,2,3,6, and 7, i.e., five sureties, while Hārīta has enumerated all, 1 to 5;[3] but Pitāmaha mentions

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1. Vastutastu yatra yatrāviśvāsasaṁbhavastatra tatra viśvāsāya rājñā pratibhūrdāpya ityevānugatam / the Vivāda-ratnākara, op.cit., p. 43.

2. See above f.n.4 at p.478, also J.R. Gharpure, trans., Smṛ.candrikā, p.148; first edn., (Bom., 1950), p.277.

3. See above, p.478, f.n. 3 and 2 respectively; also R.K.Ranade, op.cit., pp.82-83. According to him Vyāsa mentions only five sureties which seems incorrect.

only the last one. But those which are perhaps the earliest ones, such as Gautama and Vasiṣṭha, mention none by name in spite of the fact that they were aware of the existence of 'suretyship'. Otherwise, how could they lay down the rule[1] that sons are not liable to pay their father's suretyship debts? Whatever they might have thought of the term, it is fairly clear that, in the context here, it refers to the surety for payment. If this is so, it may be correct to say that the conception of suretyship originated, perhaps, in respect of debt-liability. Why? Probably because of mistrust, either real or imaginary, on the part of money-lenders, in respect of the ability and/or intentions of the would-be debtors to repay their dues; or as suggested by Candeśvara, due to a possibility of breach of faith (see above p.479); or perhaps due to the lack of initiative on the part of the money-lenders to take risks. And, as we all know, in the world of 'shortages' and 'needs', unless credit-facility is available life would be almost unbearable. It may be to help solve this problem, due to the inherent human reaction to the distressed condition of fellow human beings, that in most cases,[2] at least by

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1. Prātibhāvyavaṇikśulkamadyadyūtadaṇḍā na putrān adhyābhaveyuḥ / Gaut.XII.41, cit.above, see f.n.1 at p.473

   Prātibhāvyam vṛthādānamākṣhikam ... na putro dāturmahati // Vas.XVI.31, cit.above, see f.n.1 at p.473

2. For the exception see,
   'Gṛhītvā bandhakam yatra darśanesya sthito bhavet / vinā pitrā dhanam tasmād dāpyaḥ syāt tadṛṇam sutaḥ // Kāty. 534;
   vide P.V.Kane, cit.above, p.67, (cf. Medhā. on Manu, VIII.162).
   Kane translates (at p.223, ibid) "where a person becomes a surety for the appearence of a man after receiving a pledge from him, the son of the surety should be made to pay the money from that pledge in the absence of the father (i.e., in the case of his death or of his having gone abroad). The Mitā. on Yājñ.II.54, seems to extend this concept and applies to a surety for assurance. Vide J.R.Gharpure, trans., cit.above, pp.810-811. With reference to Kātyāyana's use of surety for appearance in this context, Gharpure, at p.811, f.n.2, says "the mention of the surety for appearance includes the surety by assurance."

implication,[1] the person who undertakes suretyship does it out of a feeling of kindness towards the plight of the would-be debtor. The act of helping the debtor on the part of the surety undoubtedly carries with it the risk of himself paying the amount involved (see Proverbs 6:1, 11:15, 20:16), in the case of failure on the part of the debtor[2] to pay his debts. This attitude of taking risks for no visible returns - except, perhaps, a kind of self-satisfaction one gets out of one's own good deeds - on the part of sureties in general, might have encouraged even the money-lenders to take risks themselves (see J.D.M.Derrett's observation above at p.476). Now, even if the above discussion in respect of the number of sureties is very sketchy,[3] it

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1. Trayaḥ parārthe kliśyanti sākṣiṇaḥ pratibhūḥ kulam / Manu,VIII.169; vide G.Jha, ed., cit.above, Manusmṛti, vol.II, p.157; "Three persons suffer for the sake of others: witness, surety and the judge"; vide G.Jha, trans., cit.above, vol.IV, pt.I, p.221. It may be noted here that one of the two interpretations given to this part of the verse by Medhātīthi runs,
   "Athavā parasyārtham kurvantaḥ kleśmāpnuvanti,
   na hyeṣam svārthagandho 'styato balānna kārayitavyāḥ";
   i.e., 'or ... these persons undergo suffering for doing the work of other persons, -- ' and they have not the slightest selfish motive, ..." (ibid.). We need not go into the controversy regarding the meaning of the word kulam in the verse (reference may be made to G.Bühler, trans., Laws of Manu, S.E.B.25, (Oxford, 1886), p.284, f.n.169. In The law relating to the joint Hindu family (Cal., 1885), K.K.Bhattacharya, at p.26, after a brief discussion, concludes that 'family' seems to be appropriate meaning of the word kulam here, rather than 'judge'; and shows by analogy, the similarities between surety and joint Hindu family, so far as their sacrifices for others are concerned. This view in the context appears more convincing though it may be noted that Kula is well known as (inferior) court.
2. See above, f.n.2 at p.475; also, see 'na prātibhāvyam anyat', Kauṭ.3.11.15 (vide, R.P.Kangle, p.113); J.D.M.Derrett, cit.above, f.n. 2 at p.475, translated the above verse, 'suretyship operates in this way only (i.e., in the absence of the debtor, his heirs, or co-obligors)'.
3. For fuller discussion see H.N.Chatterjee, cit.above, pp. 177-187.

seems sufficient, from our point of view, in conjunction with the discussion on the definition of suretyship (see above pp. 474-476) to reveal the significance of suretyship debts. Accordingly, it would appear that the suretyship came into being, unspontaneously,[1] to instil confidence whenever there seemed a possibility of a breach of faith. The earliest such circumstance seems to refer to the payment of debts (though one cannot be positively sure of this). And, though in most cases a suretyship seems to have been undertaken out of sympathy and generosity, it carried risks all the same.

Having this information in the background, we may proceed, now, to enquire into the opinions of the śāstrakāras in respect of the nature of the suretyship debts of Hindu fathers and their sons' liability therefor.

A.I.2 SURETYSHIP DEBTS AND THE LIABILITY OF THE SURETY'S SONS

(a) The Dharmaśāstra View: According to the śāstrakāras, speaking generally, sons are not liable to pay the surety debts. Thus both Gautama[2] and Vasiṣṭha[3] declared that the surety-money shall not involve the son. Their statement, however, is in general terms and as observed above there is no direct reference to any particular surety as such.

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1. Medhātīthi on Manu,VIII.169.
   "It is only on being requested by another person that the witness, the surety and the judge should appear as a witness, stand surety or investigate cases - and not forcibly (thrusting themselves); hence if these persons should volunteer to do it, their action has no validity."
   Vide G.Jha, trans., cit. above, p. 221.
2. Gaut. XII.41, (for the text, see f.n.1 at p.480 above)
3. Vasiṣṭha, XVI.26, (for text, see f.n.1 at p.480 above)

Manu states, Prātibhāvyam vṛthā-dānam ākṣikam saurikam ca yat daṇḍa-śulkāvaśeṣam ca na putro-dātumarhati // [1] which means, among other things, that where there is money due by a surety, his son shall not be obliged to pay. But immediately afterwards he explains that this rule shall apply to the case of 'surety for appearance'; "in the case of the death of the surety for payment, however, the king shall make the heirs also to pay up."[2] (An exceptional rule laid down by Manu will be discussed below at p.486). According to Yājñavalkya,[3] however, sureties for appearance and sureties for assurance are themselves liable, and in the case of sureties for payment, even their sons are liable. He further states that where a surety for appearance or for assurance dies, the sons of such surety need not pay the debt, but the sons are liable in the case of surety for payment. Bṛhaspati, too, agrees with others so far as the general rule[4] is concerned, but further declares that in case the surety defaults in respect of a suretyship for payment or for delivery of assets (of the debtor), his sons are liable to pay the debt.[5] Viṣṇu[6] remains in favour of exempting the sons

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1. Manu, VIII.159; vide V.N.Mandlik, ed., Mānavadharmaśāstra, (Bombay, 1886), p.975.
2. Manu, VIII.160; vide G.Jha, trans., cit.above, p.203.
3. Darśane pratyaye dāne prātibhāvyam vidhīyate/ādhyau tu vitathe dāpyāvitarasya sutā api // Yājñ. II.53, vide Dharmakośa, cit.above, p.665.
   Darśana pratibhūryatva mṛtaḥ prātyayiko'pi vā / na tat putrārṇam dadhyurdadhyurdānāya yaḥ sthitaḥ // Yājñ. II.54, vide Dharmakośa, ibid., p.666.
4. Saurākṣikam Vṛthādānam Kāmakrodhapratiśrutam / Prātibhāvyam daṇḍaśulkaśeṣam putrānna dāpayet // Bṛ.x 118, vide Dharmakośa, cit.above, p. 708.
5. "... both the two last (sureties), and in default of them their sons (are liable for the debt), when the debtors break their promises (to pay the debt)". Bṛhaspati, XI.41, vide J.Jolly, trans., cit.above, p.327.
6. "Darśane pratyaye dāne prātibhāvyaṁ vidhīyate / ādyau tu vitathe dāpyāvitarasya sutā api // Viṣṇu, vI.41, Dharmakośa, op.cit., p.662.

from the payment of surety-debt except in case of the surety for payment on the part of their father. Nārada[1] is in agreement on this subject with others so far as the general rule is concerned. Kātyāyana does not positively lay down any general rule excluding the sons from the liability of suretyship-debts of their father as has been done by Gautama, Vasiṣṭha, and Manu or Bṛhaspati; though he appears so (when he says, "but a debt which is 'tainted' (sadoṣaṁ) need never be paid (by the sons etc."))[2] to convey this sense. But, perhaps following somewhat thoughtlessly the latter part of the statement made by Bṛhaspati (see above) he declares that the surety's sons are liable to pay the debts in respect of a surety for payment or a surety for delivery of assets (of the debtor).[3]

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1. "... dadyātputrastu paitṛkam / ... prātibhāvyakṛtaṁ vinā // Nār.IV.10, Dharmakośa, op.cit., p.695.

2. Kātyā. 554, vide P.V.Kane, cit.above, p.228, and for the word sadoṣaṁ see p. 69.

3. " ... But the latter two and in their absence their sons also (are liable to pay) if the debtor fails in his promise." Kātyā., 536, ibid., pp.223-24. Kane, in the f.n. 536, comments,

> "This is the same as Bṛ. p.327, V.41. This verse obviously refers to the four kinds of sureties mentioned by Bṛhaspati. Vide note on 530. 'The latter two' - mean the surety for dāna (repayment of debt) and for ṛṇidravyārpaṇa (delivery of the goods of the debtor to the creditor). The son of the surety for appearance and honesty is not liable to pay his father's suretyship debt, but the sons of the other two kinds of sureties are liable to pay (but not the grandsons)."

Also, H.N.Chatterjee, op.cit., at p.199, f.n.5, observes,

> "The contradiction may be accounted for when we consider that the text of Bṛhaspati reconstructed in the light of the quotation appearing in different sources, does not claim to be genuine Bṛhaspatismṛti in its original form. There are cases where the commentators and digest-writers ascribe wrongly verses to the author to whom they do not properly belong."

> "Kātyāyana shares the verse 536 with Bṛhaspati x.78 and it may be stated here that this provision does not fit at all with his other statement regarding the number of sureties (in the verse 530, where the sureties are stated to be five in number). In that list the first two are surety for payment and that for appearance and in these two cases, as we shall see subsequently the obligation of the sons are different. In the case of the surety for payment the sons are bound to pay, while in the case of the surety for appearance they are exempted. Under the circumstances it is quite reasonable to ascribe the verse to Bṛhaspati only, where it fits properly in the context of the four types of sureties (x.77). This is strengthened by the fact that in the Smṛticandrikā, Madanaratnapradīpa, Sarasvatīvilāsa, and Vyavahāraprakāśa, this verse has been attributed to Bṛhaspati only."[1]

Also, Vyāsa says,

> "Upon a failure of assurance, or the non-performance of a writing, ordeal, or appearance, the sureties shall be made to pay the debt; one should not compel their sons to pay. The sureties for payment and dispute shall be compelled to pay and their sons also."[2]

From this it appears that even Vyāsa was conscious of the general rule, though in details he seems to differ from others.

In regard to the subject of payment of surety-debt by the surety's descendants (sons and grandsons), we come

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1. H.N.Chatterjee, op.cit., pp. 199-200.

2. q. in the Smṛticandrikā, (p. 151), vide J.R.Gharpure, trans., cit.above, p. 281.

> Vipratyaye lekhyadivyadarśane cākṛte sati /
> ṛṇam dāpyāḥ pratibhuvaḥ putram teṣām na dāpayet /
> dānavā-dapratibhuvau dāpyau tatputrakau tathā //

Vyāsa, Dharmakośa, op.cit., p. 676.

across a special rule. Thus, Kātyāyana declares that,

> "The debt (of the grandfather) arising from suretyship need never be paid by the grandson; even the son need pay only the principal[1] (of the suretyship) debt of his father."

Vyāsa's contribution in this respect appears identical to that of Kātyāyana, when he says, "the son only shall pay the debt of his father incurred by his becoming a surety,"[2] to the extent of capital only (and not the interest). He clearly absolves the grandsons of the surety from this liability.

Lastly, we have from the śāstrakāras what appears to be an exception to the general rule. Thus, according to Manu[3] and Kātyāyana,[4] it seems that in cases where the surety accepts security from the second party in return for his accepting suretyship, even the sons are liable to pay the surety-money, to the extent of the value of the security. The text of Manu does not mention the liability of the son of the surety as such, but the context is so clear (i.e., 'in the event of the death of the surety other than that for payment' see Manu, VIII.161-162) that by implication he

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1. Prātibhāvyāgatam pautrairdātavyam na tu tatkvacit / putreṇāpi samam deyamṛnam sarvatra paitṛkam // Kāty.561; vide P.V.Kane, ibid., pp.70, 232-233. This verse appears also in Śūlapāṇi's Dīpakalikā, vide here Gharpure, op.cit., (2nd edn.) at p. 811. It may be pointed out here that according to Colebrooke's trans., (cit.above, p.255) of this verse, the word sarvatra in the original, is translated as 'in every instance', which Kane seems to have ignored.
2. H.T.Colebrooke, ibid., p.254.
   Ṛnam paitāmaham pautraḥ prātibhāvyāgatam sutaḥ / samam dadyāt tatsutau tu na dāpyāviti niścayaḥ // Vyāsa. Vide, Dharmakośa, op.cit., p.676. It may be pointed out here that the translation made by J.R.Gharpure, (trans., the Smṛticandrikā, (p.152), op.cit., at p.283) is so literal as to render it almost impossible to understand.
3. Manu, VIII.161 read with 162; for a detail observation, see H.N.Chatterjee, cit.above, pp.194-195.
4. See above f.n.2 at p. 480.

almost certainly refers to the son of the surety.[1] Kātyāyana is quite clear on this point.

The above discussion in respect of the śāstrakāras' views on the subject may be summed up before we turn to the opinions of commentators upon them and digest-writers. Thus, it may be noted here that (1) most of the śāstrakāras agree on the general rule that the sons of the surety need not pay a surety-debt; (2) however, again the majority of them except certain surety-debts from the general rule; (3) then, by a special rule, they restrict the liability, in respect of these excepted surety-debts, to sons and to the extent of the capital only; and (4) lastly, an exception to the general rule is laid down (by Kātyāyana and Manu) whereby the liability of the sons is extended even to the other cases of suretyship, provided the father-surety has received security (in form of money or pledge etc.) for his becoming surety.

The commentators and digest-writers: According to the Maskarībhāṣya[2] on Gautama XII.38 (vide Dharmakośa, p.677), the term prātibhāvyam signifies, as mentioned by Vyāgra (ibid.), three sureties: for appearance, trust and payment. And relying on the rule of Manu, concerning the surety for payment, Maskarī seems to interpret this verse so as to hold heirs of the surety for payment liable to pay the surety-money, after the surety's death. Haradatta, also, taking into account the parallel passages of Manu and Yājñavalkya, restricts the application of this general rule of Gautama

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1. "Hence the words should be construed to mean 'son of the surety to whom money had been made over' as it is the son that forms the subject of the context; as for the surety himself his liability would follow from the mere fact of his being a 'surety'."
   Medhā. on Manu,VIII.162, vide, G.Jha, op.cit., p.206.
2. Pratibhuvastrayaḥ / --- 'Dānapratibhuvi prete dāyādān-api dāpayet' iti Manuvacanāt / Maskarībhāṣya, vide Dharmakośa, cit.above, pp. 677-78.

to the sureties for personal appearance of an offender.[1] The Vivāda-cintāmaṇi renders surety-money here as 'money due on account of standing surety for appearance and trust[2] -- shall not be paid by sons.' The Vīramitrodaya and the Vivāda-ratnākara hold similar views. According to them sons are liable to pay surety-money in respect of the surety for payment. Thus, it appears from these comments that both the commentators and the digest-writers have expounded the meaning of 'surety-money' (in Gaut.XII.41) in the light of what Manu and Yājñavalkya have stated on the subject.

Medhātīthi[5] on Manu, VIII.159, explains the denial of the son's liability by way of a question and answer: "How could there be any idea of the son's liability to pay the surety-money, etc., when there were not debts incurred by his father?" What is implied here is quite clear. Where (i.e., in cases of surety for appearance and guarantee) no debt is incurred by the father, there is no question of son's liability. But he goes on and points out a situation in which even if the father has incurred no debt, his mere undertaking to pay for others would bring about the same result as if he has, in fact, taken a loan. Thus he seems to explain what Manu states in the following verse: the

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1. Haradatta on Gautama, XII.41, vide G.Bühler, cit.above, trans., S.B.E.,2, p.241, f.n.41; also, Gaut.XII.38, vide Gokhale's ed., (Poona, 1910), p.97.
2. Vide G.Jha, trans., cit.above, pp.28-29; H.T.Colebrooke, cit.above, p.306.
3. Vīramitrodaya on Yājñ.,II.47, vide J.R.Gharpure, trans., cit.above, p.787.
4. "If the father were surety for payment --- must be paid by his son; as is ordained in the system of jurisprudence." Vide, H.T.Colebrooke, op.cit., p.306.
5. Kathaṁpunaḥ putrasya prātibhāvyādiprāptistarhi tadṛṇasya pitrā'gṛhītatvāt naiṣadoṣaḥ yadyen dātavyatayāṅgikṛtaṁtadgṛhītaphalatvādgṛhītameva.../
Vide V.N.Mandlik, cit.above, p.975; also, see G.Jha,trans., op.cit., p. 202.

heirs of the surety for payment should pay the surety-money after the death of the surety. Moreover, after referring to another smṛti (Yājñ.II.54),[1] he explains[2] that this rule does not apply to the sureties for appearance or confidence (for the surety for appearance includes, here, the surety for trust also).[3] It may be noted that the use of the word dāyāda in the text of Manu, here, though it includes sons,[4] has the wider meaning. It may include others[5] in absence of the sons (for further discussion see below pp.493-494). Thus, it signifies that the liability in the case of surety has reference to the property of the surety. Indeed, without the liability of the surety's property, the institution of suretyship is a mockery[6] (see above pp.475-476).

The Mitākṣarā[7] (on Yājñ.53) explains, by giving examples, what is meant by the three kinds of sureties and states that

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1. Ibid., also Rāghavānanda on Manu,VIII.160, vide V.N.Mandlik, op. cit., p.976.
2. Medhā. on Manu,VIII.160, G.Jha, ibid., p.204.
3. Prātibhāvyamityatra darśanapratyayapratibhuvau. The Vivāda-ratnākara, vide P.V.Vidyalankara, ed., cited above, p.57; also, see G.Jha, Manusmṛti-notes, pt.II, (Calcutta, 1924), p.545; Sarvajñanārāyaṇa on Manu,VIII.160, agrees, 'Darśaneti pratyayasyāpyupalakṣṇam /' Vide, V.N.Mandlik, op.cit., p.976.
4. 'dāyādāḥ putrāḥ' / The Vivāda-ratnākara, op.cit., at p.43. "The word dāyādā is confined to sons only." The Smṛticandrikā, (p.152), vide J.R.Gharpure, op.cited, p.283.
5. Yo 'yam prātibhāvyam na putro dātumarhatīti pūrvoktavidhih sa darśanapratibhūkarmaṇi/ pitṛkṛte/vijñeyaḥ/dānārtham punaryaḥ pratibhūḥ sthitaḥ tasminmṛte rikthabhājaḥ api dāpayet kimuta putrān / Govindarāja on Manu,VIII.160, Dharmakośa, op.cit., p.664;
   Dāyādānṛkthagrāhiṇonatu putrāneva / Sarvajñanārāyaṇa, on Manu,VIII.160, Mandlik, cit.above, p. 976;
   Dānapratibhuvi --- mṛte sati dayādān putrānapi dāyayet putrebhyaḥ dāpayedityarthaḥ / Rāmachandra on Manu,VIII.160, ibid.
6. J.D.M.Derrett, cited above, Essays , at p.(232).
7. Vide J.R.Gharpure, cit.above, p.809.

in the case of the last (surety for payment) sons should be made to pay, which according to him means (by implication) that the sons of the first two (i.e., surety for appearance and surety for assurance)[1] should not be made to pay. Vijñāneśvara makes an important point when he says, "By mentioning 'the sons' it has been indicated that grandsons should not be made to pay."[2] While commenting on the following verse, he even restricts the son's liability to the principal amount only; and in support cites Vyāsa.[3] Kātyāyana (see above p.486) seems to agree with this rule of Vyāsa. The Vivāda-cintāmaṇi (on Yājñ.II.54), however, appears to extend the son's liability to pay even in respect of the surety for deliverance of assets.[4] We have already referred to Bṛhaspati's view in respect of the son's liability to pay in case his father was surety 'for the delivery of the property by the debtor' (see above p. 483). In this kind of surety, says Devaṇṇa-bhaṭṭa,

> "This is what comes to be stated: 'whether it be debt or any other thing, such as money etc., I shall pay to you' in this way where a surety has given an undertaking, there the surety shall be made to pay; or in his absence his son shall be made to pay."[5]

Moreover, Vyāsa (see above p.485) may be cited in support, who states that in case of suretyship for payment and dispute,

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1. Śūlapāṇi on Yājñ.II.53, ibid.
2. See f.n.1 und 2 above at p.486.
3. Ṛṇam paitāmaham pautraḥ prātibhāvyāgatam sutaḥ / sāmam dadyāttatsutau tu na dāpyāviti niścayaḥ // Vyasa quoted in the Mitākṣarā on Yājñ.II.54, vide, Dharmakośa, cited aobve, p.666.
4. Vide G.Jha, trans., cited above, p.23.
5. The Smṛticandrikā, (p.151), vide J.R.Gharpure, trans., op.cit., p.281.

the sureties and their sons are to be made to pay. Regarding the latter, the explanation runs,

> "In the case of a surety in a dispute, he having undertaken to pay the proved amount as well as the amount of penalty[1], like the surety for payment, when he is available, he himself shall be made to pay; otherwise his son."[2]

Thus, besides the surety for payment, the son's liability seems to have extended to cover these two cases. But on what basis? The basis seems to lie in the express undertaking given by the father in these cases (as explained in the Smṛticandrikā, see above p.490). Goods, whether property or a deposit or a pledge, do represent value in money. And in this sense an agreement or a promise to pay money (debt) may be equated with that of delivery of assets or a promise to pay whatever a court would decide in respect of the liability of the debtor. This might well fit into the explanation offered by Medhātīthi on Manu,VIII.159 (see above pp.488-489). We may conclude, therefore, that the whole basis for the son's liability to pay surety-money lies in the promise or an express undertaking on his father's part to pay in the case of default made by the debtor.

On the point of the son's liability in respect of suretyship, involving acceptance of security (by way of pledge or a deposit) for becoming surety by the father, we have a few comments to consider. The gloss of Medhātīthi[3] on Manu, VIII.162, may be stated in brief as follows: Before becoming

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1. H.N.Chatterjee renders it 'fine'; it may be noted here that if this is to be taken as correct meaning, then, the liability incurred by the father, though by way of a surety-undertaking, does include 'tainted debt' in the form of fine, and as such it might be contrary to the rule that sons are not liable to pay the tainted debt of their father. In fact the reference is to the court fee payable by the defeated debtor.
2. Ibid.
3. Vide G.Jha, trans., cit. above, pp.205-206.

surety, other than for payment, the father accepts security from the debtor, who instructs him to pay his debt in case he is unable to pay, out of the security. The father-surety dies. His son succeeds him and inherits, or takes into his possession, among other things, the security. The liability of the father follows from his being surety. But the son's liability lies in his inheriting or getting possession of the debtor's security.[1] In both cases, however, the liability is limited to the extent of the value of the security and no more. Thus, Medhātīthi's interpretation appears to mean that the son's liability in such cases, as the surety for appearance or assurance,[2] is attached to the security in his hands, and that it extends to the value of the security. The Vivāda-ratnākara (q. by Jagannātha)[3] seems to hold similar view. However, according to Halāyudha[4] this kind of arrangement must not only be known but also has to be proved, otherwise the case would come under the general rule.

The Smṛticandrikā renders Kātyāyana[5] (534) thus, " When after taking a pledge, one has stood surety for appearance, there, after proving the claim, he shall be compelled to pay the debt, and his son also."[6] The rule as stated, contrary to Manu's, seems to apply during the surety's life-time as well as after his death. But one might be right in interpreting this to mean, as Kane has rendered, i.e., in case of his death or his having gone abroad (see f.n.2 at p.480 above). Moreover, having known the fact that the pledge

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1. "Only on account of the fact that he had received money"; The Smṛticandrikā, on Manu,VIII.162, vide J.R.Gharpure, trans., op.cit., p.283.
2. See above f.n.2 at p.480.
3. H.T.Colebrooke, op.cit., p.250.
4. q. by Jagannātha, ibid.
5. See f.n. 2 at p.480 above for the text and its translation.
6. Vide J.R.Gharpure, trans., op.cit., p.282.

was received by the surety (as, also, Medhātīthi on Manu, VIII.161), the claim must be proved before compelling compliance thereto from his son. Jagannātha[1] agrees to this view, but appears to visualise the circumstance arising only after the surety is dead.

In short it may be said of this exception that in a case of the surety for appearance or assurance, if the father-surety accepts security against the liability to pay, after his death or in his absence abroad his son[2] would be liable to pay the security-money to the extent of the value of the security in his hands, provided the claim as to the existence of this arrangement is proved.

We have found nothing more from the commentators than what the śāstrakāras have already told us regarding the special rule (see p. 486), and thus, why the liability in connection with the suretyship-debts mentioned therein should be inherited only by the sons (of the surety), remains something of a puzzle. But how could it be inherited in the first place? Let us try to find an answer.

We have already noted above in connection with the interpretation of the term dāyāda in the text of Manu (see p.489), as explained by Govindarāja (see above p.489,f.n.5), that the liability, in the case of a deceased surety for payment, has reference to the property of the surety. Also, we have come across (see f.n.4 at p. 489) the different view of Devaṇṇa-bhaṭṭa, on the subject, for he thought that the term dāyāda should be confined to sons only: because, in the above sense (i.e., as rendered by Govindarāja) it becomes contrary to the statement of

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1. H.T.Colebrooke, trans., cited above, 248.

2. Dravyagrahaṇe (na) prātibhāvyāṅgīkāre tu putrapautrābhyām api savṛddhikaṁ deyam. Tathā ca Kātyāyanaḥ --- ;
The Vyavahāra-mayūkha, cited above, p.177.
This seems to be an exceptional rule. See also V.N. Mandalika, cit.above, p. 68.

Vyāsa[1] and Bṛhaspati.[2] Moreover, we have discussed with appreciation (see above p.490), his principle making 'the terms of agreement' as the basis (with which he wants) to determine all the suretyship cases.

H.N.Chatterjee remarks,

> "This interpretation of Devaṇṇa-bhaṭṭa, if taken up in the light of the question raised by Medhātīthi (for which see p. 201), may be explained in the way that the undertaking by the surety himself, to pay the debt on behalf of the debtor, brings on him the liability to pay it himself. This undertaking, as Medhātīthi explains, is equivalent to a debt (incurred by him). The similarity is on the point of payment of both the types of money (the normal debt and the surety-debt) under all circumstances (avaśya-deyatvam). Once this concept is applied to the case of the surety, the position of the son becomes quite convincing. As in the case of a normal debt, the obligation of the son arises because of his status as a son (putratvena, as explained by Vijñāneśvara), independent of the question whether he inherits his estate or not, similarly that liability is extended in this case also because of the special position of the father-son relationship as conceived of in the śāstras. In the case of the surety for payment, the question of payment of the surety-debt by the son may be explained in the situation where the father leaves behind him an estate. In such a case his obligation arises in twofold ways, both as a son and as the inheritor of the estate. Where however such a surety does not leave behind any property, the liability of the son should be explained as spiritual in the sense that because the agreement of his father is regarded as equivalent to a debt and because the inability to discharge a debt is supposed to lead a man to hell, and because a father craves for the birth of a male issue for getting himself free from the possibility of falling into hell, the son has been directed to regard it as his principal duty

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1. See above p.485, f.n.2.
2. "A debt liability devolved as a surety, must never be paid by the son's son." Bṛ. q. in the Smṛticandrika (p.152), See J.R. Gharpure, trans., p.283.

> to save his father from such unholy situation. So far as the position of the son of the surety for the debtor's property is concerned, where the son also is made liable for the surety-debt of the father (as mentioned by Bṛhaspati, for which see p.226), no suitable explaination in support can be given except that the nature of the agreement provides for giving of something (arpaṇa)."[1]

What is contained in this passage is, however, an explanation justifying the passage over to the son of the liability arising out of the suretyship contract of his father, not the contract itself. Although, in the end, the result may be, for all practical purposes, the same as one would have expected in respect of the father-surety, yet we may be wrong in treating this as inheriting the suretyship. For this lacks the main requirement of a valid suretyship agreement. What we see is the product of Hindu law and not a suretyship proper. The liability itself, however, passes over to the son by way of inheritance or survivorship.[2]

Before we conclude, we have to examine the arthaśāstra provisions in respect of the surety-debt and the son's liability therefor. Once we have done that, we may draw our conclusions about the main point of our inquiry: whether or not the suretyship debt be placed under the category of 'tainted debts'.

Arthaśāstra view: The Kauṭiliya arthaśāstra also has, like the dharmaśāstra, a provision[3] according to which the surety-debt of the father need not be paid by the son

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1. H.N.Chatterjee, cited aobve, pp.218-219.
2. We shall not enter here into the question of the origin of the son's title, which both the major schools recognise as deriving at least in significant part from the fact of the son's birth.
3. Prātibhāvyam --- kāmadānam ca nākāmaḥ putro dāyādo vā rikthaharo dadyāt / Kauṭ.3.16.9, vide, R.P.Kangle, ed., pt.I, cited above, p. 122; for the trans., see pt. II, cited above, p.281.

if he is unwilling to pay it. The same applies to the heir inheriting his property. On the contrary, by another rule,[1] not only the sons but also the grandsons are placed under obligation to pay the surety-debts. As to the exact meaning of this verse, however, there appears to be no one opinion among the scholars - especially regarding the term jīvita-vivāha-bhūmi.[2] According to Kangle, the meaning of this verse is, "Sons or grandsons shall bear liability for suretyship concerning life, marriage or land to which no restriction as to place or time applies;"[3] while R.Shamasastry renders it, "Any debt, the payment of which is not limited by time or place or both for which life, marriage or land is pledged, shall be borne by sons or grandsons."[4] In the opinion of L.Sternbach this translation is probably wrong and hence he states that it should be like this, "The debt, the payment of which is not limited as to time or place, and in which (1) a person, (2) that which can be carried away, or (3) land form surety (i.e., security), should be taken over by sons or grandsons."[5] But he himself does not feel sure of his own rendering. We have no convincing commentary nor does there appear any parallel rule in the dharmaśāstra which might have thrown some light on this problem. No convincing explanation has been offered, either,

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1. Jīvitavivāhabhūmiprātibhāvyamasaṅkhyātadeśakālam tu putrāḥ pautrā vā vaheyuḥ / Kauṭ.3.11.18, ibid., pt.I, p.113.
2. On this controversy reference may be made to the following:
   L.Sternbach, cit.above, pp.189-90, f.n.60;
   J.D.M.Derrett, cited above, f.n.30;
   H.N.Chatterjee, cit.above, p.198, f.n.1.
3. R.P.Kangle, pt.II, cited above, p.263.
4. R.Shamasastry, trans., Kauṭilya's Arthaśāstra,(Bangalore, 1915), p.222.
5. L.Sternbach, op.cit., p.190, f.n.60.

on this problem by the scholars and we are left still in a state of confusion.[1]

Conclusion: Both the arthaśāstra and dharmaśāstra seem to agree on the issue that the sons should not be held liable, generally, for the surety-debts of their father. But they appear to differ in that the first appears to place both debts (in general) as well as the surety-debt on the same footing[2] in connection with son's liability to pay them (according to Kauṭ.3.11.18), while the latter has distinguished even between those surety-debts which are subject of son's liability and those which are not. Secondly, in the view of the dharmaśāstra the nature of the suretyship-debt appears to signify that the liability is basically attached, depending on the kind or purpose of the suretyship, either to the person (in cases of the surety for honesty or appearance, for example) or to the property of the surety. Also, in most cases of suretyship an element of 'risk' is present, though the nature of the risk itself may not necessarily be 'sinister or immoral' as is generally the case with risks taken in connection with 'speculative business' or 'robbery' etc.. From this point of view, it may be said that the denial of the sons' liability concerning surety-debt, generally, seems to be due to the 'personal' nature of the liability on the one hand, and the 'risky' nature on the other: especially, perhaps, to put some brakes

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1. J.D.M. Derrett, op.cit., f.n.30, at p.(242) suggests that "if one makes the small alteration of reading - prātibhāvyaṁ saṁkhyāta - the sense is exact: - they are liable for limited suretyship (in point of country and time) provided it be suretyship for a livelihood (i.e. honesty), a marriage (or betrothal) or landed property (to be mortgaged or sold etc.)"
   In a sense, (when he says, in f.n.60, that "Probably we must understand that the sentence related to the problem of the limits to which the surety guaranteed for the principal debtor.") Sternbach, (cit.above, p.190), appears to agree with the proposition limiting the scope of the liability in respect of this rule.
2. R.K.Ranade, cited above, p. 84.

on fathers' generosity, so as to protect their families from losing their joint properties; for, during those days, there appear few traces of personal property known to us. In this sense the inclusion of certain categories of surety-debts, under the category of 'tainted debts', seems reasonable.

(b) Cases concerning surety debts: The father's liability arising out of suretyship has, in certain cases, traditionally been looked at from the standpoint of his 'illegal or immoral' debts, for the purpose of determining the son's liability to pay such debts. In this connection, Mr. Justice Ranade has said,

> "Occuring in the context where it stands, it simply suggests that surety obligations recklessly incurred stand in the same category with other extravagant or immoral acts of the father which entail no liability on the sons."[1]

The father's liability arising out of his act of suretyship is therefore discussed here.

In Moolchand v. Krishna[2] (1844) the Court of Sadar Divāni Adālat had, on the advice of the Śāstri, held that by Hindu law a son is always liable to fulfil the surety engagement of his deceased father to repay money as regards the amount of principal, and if a special agreement be made for interest, then he is also liable for interest. The

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1. Tukarambhat v.G.Mulchand Gujar, (1899) I.L.R. 23 Bom.454, at p.458, discussed below at p. 500.

2. (1844) 2 Bellasis' Reports, 54.
It may be noted here that previously it was held that under Hindu law a creditor is required to establish his demand against the original debtor before he can come upon the security to that debtor to pay the debt. Also, it was held there that a widow is not liable for her husband's surety debts. Vide B.S.Keshoor v.Rajkoonwur, (1812) 1 Bor. 93.

reporting of the case is so sketchy that hardly any comment could be made except that the use of word 'always' would seem to be misleading. For, in appropriate cases, the son might not be held liable if such payment of money would be found to be for an immoral purpose.

In Nuthoo Lall v. Chedee Sahee[1] (1869) the father had incurred liability by way of suretyship in respect of payment of certain tolls at a ferry due from another person. Ancestral property of the surety was sold. It was contended on behalf of his sons that the sale was not binding on them because the father's surety did not amount to a legal necessity.[2] The Court held that as the purpose to which the purchase-money was applied was to meet an obligation purely personal to the father, and as the sale in no way benefited the estate, the sale was illegal, and the purchaser had no right to refund of purchase-money. It would appear that in this case the Hindu law of surety debts was completely left out as if it did not exist. The suretyship debt of the father did not depend, for its validity, upon 'necessity' as understood in Hunoomanpershaud's case, and therefore its application here would seem to be out of context. However, the sons could have avoided their liability, it seems, on the ground of avyāvahārika debt, had they based their defence accordingly. For, if the father's liability due to tolls would not bind the sons generally, then his suretyship debt for the same purpose could hardly be binding on them.

In the case of Sitaramayya v. Venkatramanna[3] (1888) the son was held liable, in a suit brought to recover money

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1. (1884) 12 Suth. W.R. 446.
2. It may be noted here that although necessity and recklessness on the part of the father was pleaded in Hiralal Marwari v. Chandrabali Haldarin, (1908) 13 C.W.N. 9, the case was decided on the ground of the law of Limitation. The father's surety was in respect of confidence and partly in respect of payment, not of immoral or illegal nature.
3. (1888) I.L.R. 11 Mad. 373.

from the ancestral property, on a surety bond executed by the father, since deceased. In support of the decision the names of Manu, Yājñavalkya[1] etc., were mentioned, but no discussion of any particular smṛti text is reported.

In Tukarambhat v. G.Mulchand Gujar[2] (1898) the facts were similar and the son was held liable for the father's debt incurred as a surety. The Court had examined the śāstric position on the subject in the case. According to its considered opinion, the obligation in respect of sureties for appearance and honesty was limited to the sureties themselves personally, and did not bind their sons; but the obligation in respect of sureties for payment of money lent and sureties for delivery of goods was binding on them, and their sons also, after their death.[3] Even as regards the first two classes of sureties, Justice Ranade said, "If they have derived any advantage or received a pledge, their heirs may be compelled to pay the debt."[4] The use of the term 'heirs' would seem to be misleading in that it did not specify to whom exactly it applied. Moreover, he went on to say that

> "The more general texts which class suretyship obligation with reckless and immoral debts must, therefore, be qualified by the particular texts quoted above, and when so explained, it becomes clear that they refer to particular classes of sureties which do not include sureties for payment of debts, in respect of which last class, unless the debt can be shown to have been incurred for immoral or illegal purpose, the sons are liable to discharge their father's debts."[5]

Apparently, the decision makes it clear that even in respect of those sureties for which the son would normally be held liable (i.e., payment of debts and delivery of goods etc.),

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1. Ibid., at p. 374.
2. (1899) I.L.R. 23 Bom. 454.
3. Ibid., at p. 459.
4. Ibid.
5. Ibid., at p. 460.

he might escape liability if he could show that the debt was incurred for immoral or illegal purposes.

The above two cases were followed in the case of The Maharaja of Benares v. Ramkumar Misir[1] (1904). Here the father was surety for payment of rent by a lessee to his landlord. The surety's sons were held liable in spite of their contention that the rule applied only to transactions purely of a ready money character, and not to sureties for payment of rent etc..

In Narayan v. Venkatacharya[2] (1904) a suit for execution of a decree against the grandfather for his suretyship was challenged by his grandson. It was held that the grandson was not liable, in view of the Mitākṣarā, for his grandfather's surety, "unless the latter in accepting the liability of the surety received some consideration for it."[3] This view would seem to be erroneous, for in Mitākṣarā there appears to be no such reference to this effect in respect of surety for payment of grandfather, (see above pp. 489-490).

In C.V.Reddiar v. C.K.V.Reddiar[4] (1905), following Sitaramayya and Tukarambhat's cases above, sons were held liable for their father's security for payment of a grandmother's maintenance-money. Also, in Rasik Lal v. S.Rai[5] (1912) the son was held liable for his father's surety for payment of debts. The case of Reddiar above was followed in D.Kameswaramma v. V.Venkatasubba Rao[6] (1915) where the facts were similar.

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1. (1904) I.L.R. 26 All. 611, at p.615.
2. (1904) 6 Bom. L.R. 434.
3. Per Ranade, J., ibid.. Also, see Gour's Hindu Code, 4th edn., cit.above, at p. 545; S.V.Gupte, Hindu Law, (1947 edn.), at p.738. It may be said that even Gupte's view is not correct because the Privy Council's case, relied on there, was not of a surety.
4. (1905) I.L.R. 28 Mad. 377.
5. (1912) I.L.R. 39 Cal. 843.
6. (1915) I.L.R. 38 Mad. 1120, at p. 1122.

In the case of Raghunandan Prasad v. Chem Ram[1] (1915) the son was held liable to discharge the liability created by his father by way of indemnity clause. The Court observed that "It cannot be said that the debt incurred by Murli Manohar (the father) was tainted with immorality."[2] However, whether or not this was a case of surety is not clear from the facts of the case. Though the decision would seem to be correct in view of the facts of the case, whether such an indemnity clause would be binding upon a vendor's sons, where the father alone was the vendor, would seem to depend on the nature of the liability. In such a case the liability would not be one under suretyship properly so called.[3]

In Thangathammal v. Arunachalam Chettiar[4] (1918) a Hindu father executed a surety-bond stating that he would make the debtor pay within two months the amount due on a promissory note already executed by the latter and that, in default of the payment by the debtor, he would pay. The contention that the surety was for assurance and not for

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1. (1915) 27 I.C. 895.

2. Ibid., at p. 896, c.1.

3. The essentials of a proper contract of surety:
   "There must be a creditor, a principal debtor, and a quarantor or surety, who makes himself liable for the liability of the principal debtor. .. But where the contract between the surety and the creditor is not a collateral undertaking but creates an original liability as between these two parties then the contract is not one of surety but one of indemnity."
   per Mullick, J., in Mahabir Prasad v.Siri Narayan, (1918) 3 Pat. L.J. 396, at pp. 399-400. This was a case of the father's liability due to indemnity, and because it was found not to be usual or customary, i.e., vyāvahārika, the sons were held to be free from any liability.
   Also, see Bharatpur State v. Sri Kishan Das, (1935), I.L.R. 58 All. 804, (F.B.). The facts and decision in this case would seem to be, in effect, similar to that of Mahabir Prasad's case. See particularly the judgement of Sulaiman, C.J., at p. 810.
   Also, see Alla Venkataramanna v. P.Mangamma, I.L.R. 1944 Mad. 867, where Bharatpur State's case was followed at p.888.

4. (1918) I.L.R. 41 Mad. 1071.

payment, and that the fact that the money had already been lent to the debtor before execution of the surety-bond was an indication of that, was overruled by the Court on the ground of express promise to pay by the father. The sons were held liable.

In the case of Satya Charan Chandra v. Satpir Mahanty[1] (1918) the father's liability arose out of his surety given for good behaviour of a stranger as Tahsildar to the decree-holders. The actual terms of the surety-bond showed that he stood surety in respect of any misappropriation of funds etc.. The Court held that the action of the father in standing surety for good behaviour of a stranger and pledging joint family property for that would be unlawful under Hindu law as affecting the son. After discussing certain points regarding illegal or immoral debts, the Court said, "If a father's debt, incurred by his own breach of the law, is an illegal debt, then the father's debt, incurred by a stranger's breach of criminal law, is also an illegal debt."[2]

In the case of Balkrishna Sahai v. Sham Sundar Sahai[3] (1920) the son was sued to recover from him his father's surety debt. Following the decision in Mahabir Prasad v. Sri Narayan (1918) 3 Pat. L.J. 396 (see f.n.3 at p.502 above), the Court held that

> "A Hindu son or grandson governed by the Mitākṣarā Law is liable for the debt of his father or grandfather due on account of a contract of suretyship for the payment of money and which comes within the meaning of vyavahāra ... unless the transaction is either illegal or immoral."[4]

Although the decision in respect of the son's liability was correct, the remarks concerning the grandson's liability were

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1. (1919) 4 Pat. L.J. 309; cf. Choudhari Govinda Charan Das v.Hayagriba Upadhaya, (1931) I.L.R.10 Pat.94, (see p.505 below)
2. Per Roe, J., ibid., at p.311.
3. (1920) 56 I.C. 962.
4. Ibid., c.2.

incorrect. For the case relied on for the purpose was, in the first place, not a case of a 'surety' proper, but of an 'indemnity'; and secondly, its view on the point was 'obiter', and therefore, it could hardly be taken as an authority.

In Brij Nath Prasad v. Bindeshwari Prasad Singh[1] (1925) the grandfather had undertaken liability as surety in case a guardian was found liable but failed to pay to his ward. His grandson contended that neither he nor his joint family property was liable for the debt under Hindu law. However, the property in his hand was held liable. Apparently, the decision would seem to go against the decisions on the subject, (see above Narayan v. Venkatacharya's case at p.501 or Lyallpur Bank's case at p.506 below); for there was nothing to show that the grandfather had received any consideration in return for his suretyship.

In the case of Chakhan Lal v. Kanhaiya Lal[2] (1929) the father assured his brother's creditor that in default of payment by his brother, he would pay the debts. Following the cases of Maharaja of Benares, and Rasik Lal (see above p.501), the Court held that undoubtedly the liability of the father in this case was binding on his sons.[3] Also, the decision in Mata Din Kandu v. Ram Lakhan[4] (1930) was the same as in the above case. Here the father had assured payment of a decretal debt of another person.

In the case of Tulshi Prasad v. Dip Prakash[5] (1931) the son was held liable for his father's suretyship debts. In this connection, the Court said, "So far this Court is concerned, it is settled law that ordinarily a son is liable for the surety debt of his father unless it is shown that the debt is tainted with immorality."[6]

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1. A.I.R. 1925 Pat. 609.
2. A.I.R. 1929 All. 72.
3. Ibid., at p. 74.
4. (1930) I.L.R. 52 All. 153.
5. (1931) I.L.R. 53 All. 695.
6. Ibid., at p. 697.

The father in Choudhari Govinda Charan Das v. Hayagriba Upadhaya[1] (1931) stood surety in the matter of appointing a guardian for damage, waste, misappropriation etc. of the ward's property by the guardian. Following Satya Charan Chandra's case (see p.503 above), it was held that the security bond was for the honesty of the guardian, and under Hindu law, the liability of the surety could not be enforced against the ancestral property in the hands of the son and grandsons. Further, it was held that "such a plea can be successfully taken by the son even after the property has been sold in execution of a decree against the father."[2] However, going by the facts of Satya Charan Chandra's case, it may be said that it would depend upon actual terms of the surety-bond, and also the nature of the acts of the person in respect of whom the surety was given in each case.

In the case of Hanumantha Rao v. Venkatakrishnayya[3] (1933) what appears to be a surety for appearance and confidence in that the father had undertaken liability in case a judgement-debtor did not file his insolvency petition within the time allowed, was construed to be for payment on the ground that a decree was passed against the father in respect of the said liability and hence it was a decretal debt. As regards the liability of his sons, after his death, the Court said that

> "It appears to me that a surety debt which is not either immoral or illegal is one which the sons are bound to pay unless it is one for honesty or appearance, and in my opinion the obligation undertaken that the judgement-debtor would file an insolvency petition being outside any of four undertakings enumerated in the texts should be held as one binding on the sons."[4]

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1. (1931) I.L.R. 10 Pat. 94.
2. Ibid., at p. 104.
3. (1933) 65 M.L.J. 609.
4. Ibid., at p. 616, per Pakenham Walsh, J.; cf. K.Lakshminarayana's case, below at p. 507.

The distinction made on the ground of undertakings mentioned in the texts would seem to be too literal and therefore unconvincing. One would think that the Court should have determined the nature of the father's surety in the context of the undertakings enumerated in the texts.

In Dwarka Das v. Kishan Das[1] (1933) the father had executed a surety-bond for payment of a certain amount in a family compromise. However, after his death, his son refused to recognise the liability in a suit by the bond-holder to execute the bond. After upholding the legal position that the son is liable for the father's liability in respect of the surety for payment, the Court said, "But if the surety for appearance or for confidence had bound himself after taking some property in pledge, then his son must also pay the suretyship debt, from the property taken in pledge."[2] The son's liability in such a case would therefore clearly depend upon and to the extent of the property taken in pledge; otherwise he would not be liable for this kind of surety. It was also held, obiter, that "the liability of the grandson for the payment of the debt incurred as surety does not exist."[3]

Following the decision in Narayan v. Venkatacharya, (see above p.501) in Lyallpur Bank Ltd. v. Mehr Chand[4] (1934) the grandson was not held to be liable for his grandfather's liability due to suretyship for payment unless the grand-father had received consideration for the debts.[5] In this case there was no evidence to the effect that the grandfather had received any consideration, and therefore, the grandson was free from any liability. However, this decision and that of Narayan v. Venkatacharya were rightly criticized

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1. (1933) I.L.R. 55 All. 675.
2. Ibid., at p. 681.
3. Ibid.
4. A.I.R. 1934 Peshawar 132.
5. Ibid., at p. 133, c.2.

on this point of the grandson's liability for his grandfather's such debts in Sarwan v. Kunjilal's case, A.I.R. 1951 M.B. 49, discussed below at p. 510.

In K. Lakshminarayana v. Hanumantha Rao[1] (1935) the father had executed a surety-bond, undertaking that a judgement-debtor would file an insolvency petition within a specified period. The petition was not filed and in the meantime the father died. The surety was held to be 'for confidence' or 'for honesty' and therefore the sons were not liable. The decision would seem to be correct, for it has followed the law correctly.

The decision in Dhir Narain Chand v. Shiva Sahay Chaudhary[2] (1935) was to a similar effect in that the sons were not held liable for their father's liability due to surety for appearance. The person for whose appearance the surety was given died before the date concerned.

In Satrohan Singh v. Uma Dutt[3] (1935), due to the Court's order, but without personal responsibility, the father had executed a security bond hypothecating family property to pay costs that might be awarded against a third party to the decree-holder. In the suit of the decree-holder to execute the bond against the family property, the Court, after distinguishing Maharaja of Benares and Sitaramayya's cases (discussed above pp.501 and 499 respectively), said that,

> "In our opinion a debt incurred personally by the father in a joint Hindu family for being surety for payment of money, as distinguished from a debt for being a surety for appearance or for honesty for another, is binding under Hindu law upon sons, but a mere hypothecation of the joint family property for the purpose of securing a debt cannot be enforced against the joint family property, unless it can be shown, in some

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1. (1935) I.L.R. 58 Mad. 375.
2. A.I.R. 1935 Pat. 127.
3. A.I.R. 1935 Oudh 455.

> manner that the hypothecation was for legal necessity or for antecedent debt."[1]

In the present case it was not alleged that any such circumstances were present.

In the cases of Malak Chand v. Hira Lal[2] (1935), Shamrao Keshav v. Shantaram Naik,[3] (1935), Pandurang v.Abdul Hussain[4] (1939), Daljit Singh v. Harkishan Lal Sah[5] (1940), Kanjeshwar Nath v. Benares Bank Ltd.[6] (1940) the sons were held liable for their fathers' sureties for payment. The facts and the circumstances of these cases involved hardly any scope for criticism, for the decisions were straightforward in accordance with Hindu law.

In the case of Kesar Chand v. Uttam Chand[7] (1945) the father's surety-bond was construed in the light of an order of the Court below, and actual terms of the bond. Accordingly, their Lordships of the Privy Council held on the construction of the surety bond that the scope of the liability of the surety was limited to proceedings against the properties specified only, thus creating a charge on them excluding all personal liability.[8] Thus, due to lack of personal liability on the part of the surety, the bond ultimately proved to be no value because, in the absence of any debts due from the father, the Privy Council avoided the liability in respect of both secured and unsecured properties by reason of the pious obligation on the sons to pay the father's debt and passed the decree accordingly in favour of the sons and the grandson.[9]

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1. Ibid., at p. 456, c.2.
2. A.I.R. 1935 Oudh. 510.
3. A.I.R. 1935 Bom. 174.
4. I.L.R. 1939 Nag. 536.
5. A.I.R. 1940 All. 116.
6. A.I.R. 1940 All. 196.
7. A.I.R. 1945 P.C. 91.
8. Ibid., see p. 93, c.2.
9. Ibid., see p. 94, c.1 & 2.

However, one would have thought that the terms that "I stand surety for ..., and I agree that my movable and immovable properties detailed thereunder shall be liable" etc. (my emphasis) seemed clear enough to impute personal liability to the father, at least to the extent of property comprised in the bond; and if so, the sons', but not the grandson's, shares would seem to have been liable.

In Lingbhat v. Parappa[1] (1951) the question raised, in view of the above Privy Council decision, was whether the sons were liable by reason of their pious obligation to pay the father's debt incurred as a surety for payment of money, out of their joint family properties.

After explaining at length the decision in Kesar Chand's case (above), the High Court held that

> "The whole question, in our opinion, turns on the terms of the surety bond. If under the terms of the surety bond the father has rendered himself personally liable, be it an ordinary personal bond or even a mortgage or a pledge importing personal liability for the deficit if any on the realisation of the security, the sons are certainly liable to pay the father's personal debt incurred in this manner to the extent of their right, title and interest in the joint family properties."[2]

Thus, the father's personal liability would have to be established for the purpose of attracting the son's liability to pay such debts of the father. In view of the facts of the case, the sons' appeal was dismissed. In the opinion of the Court, the law on the subject remained unchanged, for the decision in Kesar Chand v. Uttam Chand did not make any departure from the true position as it obtained before 1945;[3] i.e., as explained above, the surety debts of the father would be binding on the sons.

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1. A.I.R. 1951 Bom. 1.
2. Ibid., at p.3, c.2.
3. Ibid., see p.4, c.1.

In the case of Sarwan v. Kunji Lal[1] (1951) the question to be decided was whether the grandson is liable for his grandfather's suretyship for payment. It was contended that he was not liable, unless it is proved that consideration was received by the grandfather for accepting the suretyship. After carefully reviewing the case-law and the śāstric position on the point - which we have already discussed above (f.n.1 - 2 at p. 486 & f.n. 2 at p. 489) - Mr. Justice Chaturvedi held that under Hindu law, a grandson is not liable for a debt contracted by his grandfather as surety, and the question whether any consideration was received by the grandfather does not arise.[2] In view of the fact that this was a well considered judgement, though of a single judge, it may be said that the law laid down here would seem to be correct; for the texts have expressly confined the obligation to pay only to the surety's sons.

The cases of Kalappa v. Venkatesh[3] (1962), Hindustan Commercial Bank Ltd. v. Sohanlal Gagumal[4] (1970) and Kanisetti A. Rao v. A.R. Reddi[5] (1970) concerned the son's liability to pay his father's surety for payment, and in all these cases the sons were held liable. In the last mentioned case, the Court said, "It made no difference to their liability that the money had already been lent to the debtor before the surety-bond was executed."[6] In the Hindustan Commercial Bank case, the sons' contention was based on the want of any family need or benefit. But the Court held that

> "the surety-bond in question created a personal liability on the father to pay the third person's debt; and that debt being neither illegal nor

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1. A.I.R. 1951 M.B. 49.
2. Ibid., at p. 51, c.1.
3. A.I.R. 1962 Mysore 260.
4. A.I.R. 1970 P.&H. 67 (F.B.).
5. A.I.R. 1970 A.P. 158 (F.B.).
6. Ibid., at p. 162, c.2.

> immoral, the joint family estate in the hands of the sons was liable for the payment of the same in view of the pious obligation of the sons to pay their father's debts."[1]

There was hardly anything to comment upon in the above cases, which has already not been covered in the above discussion.

A.I.3 CONCLUSION

Thus, to sum up the present position, it may be said that (i) in respect of surety for payment or performance of a contract to deliver goods, etc., the son is generally liable under the pious obligation if the principal debtor defaults after the father's death, provided the terms of the surety-bond disclosed personal liability of the father and the purpose of the debt was not illegal or immoral. The grandson is not at all liable for such debts, both in the eyes of the śāstras and the modern Courts of law; perhaps in order to restrain indefinite liability under a contract of which the party pursued (i.e., grandson) has no personal notice and as a check on fraud. However, identity of father and son appears to be useful here, especially where joint family is needed (as in partnership law) to secure the lender. (ii) As regards surety for honesty or appearance, no financial liability may ever arise, but if it does after surety's life-time, the receiver of the surety is to lose his right against the male issue generally, simply because no debt of the father occurred in his lifetime. When a pledge or other security was taken by the surety himself, i.e., the father, at dharma-śāstra the sons and heirs would be liable[2], but this rule also would seem to have been abandoned in modern Hindu law[3]

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1. A.I.R. 1970 P.& H. 67, (F.B.), at p.74.
2. See above, p. 491 ff.
3. For a similar view, see J.D.M.Derrett, Suretyship in India, etc., cit.above, pp.

(see above the case of Sarwan v. Kunjilal, at p. 510.)
(iii) Looked at from the dharma concept, it may be said that as a surety for payment is likely to become a creditor (after meeting his surety liability) of the debtor, there seems to be hardly any dharma in agreeing to be surety. However, a surety for honesty or appearance seems to agree to do so out of dharma. Whether he alone can claim the merit of this, under the mīmāṁsā doctrine on the subject of vicarious merit, or whether it can be shared by his sons, etc., seems to depend upon the choice of philosophy; for mīmāṁsā is, as seen above (see pp. 393-394), only one of many equally valid philosophies.

A P P E N D I X II

Pavāra, Viśvāsarāva, Gharāṇyācā Aitihāsika Kāgada-Saṁgraha

Pavāra, Viśvāsarāva, Gharāṇyācā Aitihāsika Kāgada-Saṁgraha

Transliteration LEKHĀṄKA - 1 10.12.1677

Mahajaranāmā ba tārīkha 24 māhe savāla roja dusabe su samāna sana 1087 Surata majalesi kasabe Pāranera sababa āṁkī rājaśrī Bubājī rāje valada Kṛśṇājī rāje Pavāra mokadama mauje Supe pa Pāranera yāsi Viṭhojī valada Dasapātīla Vāḍekara mokadama ka Vāḍe ta ma sa Junara lehona didhale yaise je āpalā gaṅva tumhāsa sana 1085 va sana 1086 madhe jāgīra hotā. tyāsa ugavanībadala āpalā bāpa Dasapāṭīla va Rāmājī valada Viṭhojī Desapāḍiyā ta ma he doghe ānaūnu kasabe Pāranerī jāgīra mhanaūnu adabakhānā ghālūna bulākhī Copadāra cākara hajurī mahasala ṭhevilā hotā tyāsa Daṣapāṭīla majakure va Rāmājī Desapāḍiyāneṅ bulākhī Copadāra ādabakhāniyāta rātrī ādaracyā ādara koṭhaḍīmadheṅ phāsī ghālūna bulākhī purā karūna khūna kelā āni bulākhī majakurācī matā moharā 90 navada hotyā tyā gheūna ādabakhānā phoḍūna Dasapāṭīla va Rāmājī Desapāḍiyā palona gele. tyāvarī Copadārācā vārīsa darabārīṅ jāūnu phiryāda jālā. kūnabāhā va tyācī matā je gelī hotī te yaise sadarahu pai darabārī tumhāsa paḍile te tumhī deūna Copadārācā māmilā phārīkha kelā. tyāvarī sāhebī Vāḍekarāsa talaba pāṭhavilī kiṁ hajura yeūna khunācā va matecā javāba karane. tyāvarī āpalā bāpa Dasapāṭīla va Rāmājī Desapāḍiyā hātīṁ lāgale nāhiṁta. palona gele. maga āpanāsa Dasapāṭīlacā pharjada mhaṇaūnu talabe gheūnu ale. tyāsa māhārāje pharmāvile kīṁ āpalā khūna kelā āhe va tyācī matā nelī āhe tyācā javāba karaṇeṅ. āpaṇāsa darabārī mavalaga paike paḍile āheta mhaṇaūnu pharmāvile. tyāsa khūnabāhā pāhatā rajapūta melā tyācā khūnabāhā sone mana sāḍe tīna hote. tyāce paike mabalaga hotātī. javāba karavale. nava jātī mhaṇaūnu radabadala jāliyāvarī khūnabāhā rupaye 1240 bārāse cālīsa va matā moharā 90 naū (da) dara moharesī rupaye 14 pra rupaye 1260 bārāse sāṭhī mokarā rupaye hajāra

2500 aḍīca he āpaṇa barajāye rakabata khuda kabūla kele. he paike Dasapāṭīla va Rāmājī Desapāḍiye yā hara dojana mudatī mahine tīna mokarara keli āhe. te mudatīsa jhāḍā karitīla. jarī mudatīsa jhāḍā na karitīla tarī Vāḍācī mokadamī va desapāḍepaṇa tumhāsa mirāsa karūnu didhalī āse tīṁ donahī vataneṅ lekarāce lekarī ārjānī karaṇeṅ. hā mahajara sahī.

dā Govida Jaganātha ā Desapāḍiyc kā Pāranera.
dā Giramājī Govida ā Desaṣaḍiye pā Pāranera.
dā Ābadūla Karīma va Sayājī Desamukha pā Pāranera.
dā Rāghojī Bābājī ā Desamukha pā Pāranera.
dā Mokadama va Seṭiye va Mahājana kasabe Pāranera.
dā Rāghojī Nīlakaṭha Kulakarṇī ka mā.
di Āpājī Kṛsṇa Ciṭinīsa pū Pāranera.
Ni Nāgara Viṭhojī Pātīla.

T r a n s l a t i o n

The Historical Records of the Pavār, Viśvāsarāo Family

The document No. 1, dated 10.12.1677

The statement dated 24th of the tenth month (i.e.) second day of the eighth (month) of the Arabic year 1087 (10.12.1677 A.D.) in connection with the decision of the Surata Court in the case concerning the chief town Pāraner is hereby given in writing by Viṭhojī, the son of Dasapāṭīl Vāḍekar, the head of the chief village Vāḍe, taluka Junar, to Bubāji Rāje, the son of Kṛsṇājī Rāje Pavār, the head of the village Supe, district Pāraner (which is) as follows:

"My village was assigned to you for the collection of revenue during the years 1085 and 1086. (However) in connection with realization of the revenue concerned, my father Dasapāṭīl and Viṭhojī Desapāḍiyā's son Rāmājī went to the (district) treasury at the chief town Pāraner where

public revenue was deposited. (It) was in the custody of the Copadāra (attendant) - a Government servant. Both Dasapāṭīl and Rāmājī Desapāḍiyā grudgingly (or vengefully) claimed their right to the amount realized. They personally overpowered the attendant and forced him into one of the rooms where in the darkness of the night, they murdered him by strangulation; and then, they broke open his safe, stole his property - 90 mohuras (gold coins) and ran away. Thereupon the heir (son) of the Copadāra lodged a complaint to the (King's) Council. You had settled the litigation regarding the right of collection of revenue by paying the whole amount (both) in respect of compensation for the murder and his property in accordance with the order of the Council (Court). Your Lordship, then, lodged a demand for the payment from the Vāḍekaras (i.e. Dasapāṭīl and Rāmājī Desapāḍiyā). In this connection the King summoned the Vāḍekaras to personally attend and answer the charges regarding the murder and the property concerned. However, my father Dasapāṭīl and Rāmājī Desapāḍiyā could not be found. (They) ran away. Hence I was taken to answer the demand because of my being Dasapāṭīl's son. There, the King said that the murder of his (servant) is committed and his property is stolen, (so) answer the charges. He (also) mentioned that his treasury was full of money. Regarding the compensation for murder (I was told that) the dead man being Rājaputa, the compensation for his murder would usually be three and a half maṇa of gold. Its cost in terms of money amounted to a very large sum. The witnesses were called (and cross-examined). (I) prayed for mercy, and in the presence of (respected people of) nine castes, (humbly) requested to fix the amount to be charged to the extent of what was paid by his Lordship (Rāje Pavār) into the Court. After long discussion, compensation for the murder was fixed at Rupees 1240 twelve hundred forty, and for the property - mohuras 90 nine(ty), Rupees 1260 twelve hundred sixty, at the rate of Rs. 14 per mohur, making a grand

total of Rupees 2500 two and a half thousand as original sum due; (and) to the payment of which (I) personally agreed. (lit. I accepted it to be placed on my own neck). The amount due was to be paid by each of the two - Dasapāṭīl and Rāmājī Desapāḍiyā, (or on their behalf) within the fixed period of three months. They were (ordered) to pay in the time. If (they) failed to pay within the time, the authority to manage the village Vāḍe (i.e. Mokadamī) and powers of Desapāḍe would belong to you as Mirāsa (an hereditary right to land-tax). You may enjoy these two rights (or titles) from generation to generation. This statement is given in writing;" signature.

Comments: The word khūnabāhā is important. It means compensation for a murder. Usually, it was paid to the victim's heirs or relations. That such payments were extracted from the criminal's sons is quite clear from the mahajara.

There is no mention of fine in the case. However, in view of the king's utterance that his treasury is full of money, it seems that he may have uttered those words to assure the son (of Dasapāṭīl) that he need not extract any money by way of a fine from the son, and therefore perhaps, the son was not made to pay any fine in this case. We cannot be sure, however, as to whether a fine was included in the original payment (made by Rāje Pavār). However, it is quite clear that the son was made to pay his father's debts arising both by way of compensation for a murder committed by him of another person, and reimbursement of the property stolen by his father.

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